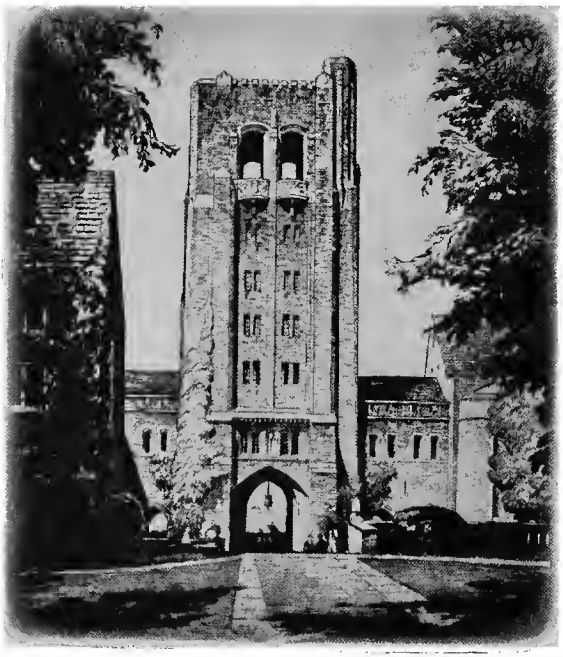

FEDERAL INCORPORATION

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Constitutional Questions Involved

BY

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PREFACE.

The subject of Federal Incorporation, and especially the constitutional questions involved, are among the most interesting and vital confronting the people of the United States. The author of this treatise, Mr. Roland C. Heisler, a graduate of the Law School of the University of Pennsylvania and a member of the Philadelphia Bar, held the position of Gowen Memorial Fellow in the Law School from September, 1910, to September, 1912. There are four such Fellowships in the school, founded by Mrs. Esther Gowen Hood, in memory of her father, Franklin B. Gowen, a distinguished lawyer. The primary object of the foundation is to enable those holding the Fellowship to devote all their time to legal research and analysis. During the first year of his Fellowship, Mr. Heisler studied the constitutional questions which he here analyzes and discusses. The delay in publication, after the text was in print, has been due to causes over which he had no control.

WILLIAM DRAPER LEWIS.

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CHAPTER I.

THE NATURE OF THE POWER VESTED IN CONGRESS BY THE COMMERCE CLAUSE.

The problems which are discussed in this treatise involve for the most part questions arising under the power over interstate commerce vested in Congress by the Constitution; and accordingly it has seemed appropriate, as a preliminary matter, to consider briefly the nature and extent of this power, which, at the present time, is perhaps the most important and far-reaching possessed by the Federal Government.

The Constitution merely provides: "The Congress shall have power — To regulate commerce with foreign nations, among the several States, and with the Indian tribes."

Prior to the adoption of the Constitution each State had absolute power over its interstate and foreign commerce, and could tax it at will or prohibit it altogether. In the Articles of Confederation it was expressly provided that the United States should not by treaty interfere with the right of each State to prohibit "the exportation or importation of any species of goods or commodities whatever." [1]

As a result of rivalries and jealousies between the States, the exercise of this power placed commerce in such an unenviable condition that there was a general

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[1] Article IX, section 1.

feeling that a change was necessary, and little objection was therefore made to the clause of the Constitution which placed the power of regulation in the hands of the Federal Government.

Owing to the scarcity of contemporaneous literature on the subject, it is difficult to determine the exact power which was intended to be vested in Congress by those who adopted the Constitution. At that time the navigation of the high seas was the chief means of commercial intercourse between the States, and there was more commerce with foreign countries than among the several States. It seems fairly clear that the main object sought to be accomplished by the clause in the Constitution, so far as interstate commerce was concerned, was to free that commerce from the burdens and restrictions imposed by the individual States. From this it has been argued that Congress possesses merely a negative power to insure the free passage of commerce from State to State, and that there was no intention to transfer from the States to the national legislature affirmative powers of control.

But whatever may have been the primary intention for the insertion of the clause in the Constitution, it must be remembered that under the precise wording the power granted is not a mere negative duty to restrain hostile State action, but is clearly an affirmative power of regulation placed in the hands of a sovereign government. There has been such a vast change in the character of commerce itself, and in the instrumentalities by which it is carried on, and the subject has become of so much greater importance, that a power of regulation at the present time may include within its scope far different measures than were ever contemplated at the time of the adoption of the Constitution. This does not mean that the Constitution is to be abrogated or altered

to suit the convenience of the legislature, but merely means that the people who adopted that instrument "must be understood to have employed words in their natural sense, and to have intended what they have said." [1]

In other words, in determining the validity of an act passed under the commerce power, the question is not, is it such a regulation as those who adopted the Constitution intended to give to Congress the power to enact, — but rather, is it a regulation of commerce within the ordinary meaning of those words? To attempt to ascertain and to rely upon the intentions of the framers would in many cases cause difficulty and confusion. For example, although the chief reason for placing in the hands of the Federal Government the power to regulate interstate commerce may have been to remove that commerce from the possibility of State restrictions, and there may have been no intention to grant the power of affirmative control, yet it is equally clear that, so far as foreign commerce was concerned, the Federal Government was intended to possess the power to carry out the prevailing economic policy of the time, and restrict or prohibit altogether commerce with those nations which adopted an unfriendly policy towards the United States. Yet the words employed to convey the power over foreign commerce are exactly the same as those which convey the power over interstate commerce. "The reasons which may have caused the framers of the Constitution to repose the power to regulate interstate commerce in Congress," the Supreme Court has said, in a comparatively recent case, "do not, however, affect or limit the extent of the power itself." [2]

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[1] *Gibbons* v. *Ogden*, 9 Wheat. 1, 188.

[2] *Addystone Pipe and Steel Co.* v. *United States* (1899), 175 U. S. 211, 228.

In fact, in view of the decisions in recent years, any discussion of the narrow construction contended for seems entirely academic. The nature of the power as defined by the Supreme Court in the early case of *Gibbons* v. *Ogden* has been many times affirmed.

"What is this power?" said Chief Justice Marshall. "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution. . . . If, as has always been understood, the sovereignty of Congress, though limited to specific objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse." [1]

Until recent years there was little attempt on the part of Congress to enact affirmative regulations. For the first half of the nineteenth century the difficulty in the Supreme Court was to determine from a consideration of State statutes whether the States could exercise a concurrent jurisdiction over interstate commerce, or whether the power of Congress was exclusive; and for the next thirty years the problem was to decide how far the exercise of the reserved powers of the States was

[1] 9 Wheat. 1, 196.

limited by the commerce clause. By that time the subject had become of so great importance that Congress began to enact affirmative measures in the exercise of its power.

The first great step taken was in 1887, when the Interstate Commerce Act was passed. This was followed, in 1890, by the Sherman Anti-Trust Act, and numerous other statutes have been enacted subsequently. The decisions in the Supreme Court clearly demonstrate that the limit of Congressional action has by no means been reached, and the precise extent of the federal power has yet to be determined. The large growth of industrial corporations has made the subject of the utmost importance, because it is by virtue of this power that Congress is believed to be capable of controlling these bodies. More efficient regulation than is in force at present unquestionably appears desirable. One method which has been suggested is that the Federal Government shall itself incorporate companies to engage in interstate commerce, and it is the purpose of this treatise to discuss the constitutional questions which would be involved as a result of such legislation.[1]

[1] A bill to provide for the formation of corporations to engage in interstate and international trade and commerce was introduced in the House of Representatives on Feb. 7, 1910 [61st Congress, 2d Session, H. R. 20142], but no action has as yet been taken thereon.

CHAPTER II.

INCORPORATION UNDER THE COMMERCE CLAUSE.

In discussing the power of Congress to create corporations, a practical distinction must be noted in the nature of Congress itself. By the Constitution, Congress is given power "to exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may by session of particular States and the acceptance of Congress become the seat of government of the United States"; and also "to make all needful rules and regulations respecting the territory or other property belonging to the United States."

As a legislative body, therefore, Congress has what might be termed a dual nature. It may act solely as the national legislature, or, in addition to this, it may act as the legislature for the District of Columbia or the Territories. This does not mean that there is any difference in the method of passing local laws for the District or the Territories and that of legislating for the country at large; nor that laws made in pursuance of the former power are any less the laws of the United States than those made under the latter. The difference lies in the fact that Congress, when acting solely as the national legislature, can exercise only those powers conferred upon it by the Constitution, while in legislating for the District or for the Territories, the powers which may be exercised are as full and complete as those of a State with respect to the persons and property within the jurisdiction of the State.[1]

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[1] *Capital Traction Co.* v. *Hof* (1898), 174 U. S. 1; *Murphy* v. *Ramsey* (1884), 114 U. S. 15; *National Bank* v. *Yankton* (1897), 101 U. S. 129.

Thus, whatever may be the limitations upon the power of Congress to incorporate as the national legislature, it may as freely charter companies to engage in business in the District of Columbia and the Territories as a State may incorporate companies within the State. For example, in the District of Columbia, Congress has created such corporations as an insurance company,[1] a savings bank,[2] and a cemetery company.[3] These corporations, however, are not regarded as of national character. They have the same status as State corporations, in that they can demand recognition of their corporate privileges within the District only, and if they seek to pass beyond that jurisdiction and do business within a State, they may be excluded altogether, or forced to comply with the requirements of the State law as to foreign corporations.[4]

But, as mentioned, Congress in its capacity as the national legislature has not the same sovereign powers as a State, but has only such powers of legislation as are conferred by the Constitution. It is an elementary principle that the Federal Government is one of enumerated powers. Certain acts of legislation may, however, be within the power of Congress, and yet not be granted in express words by the Constitution. In the celebrated case of *McCullough* v. *Maryland*,[5] it was decided that the constitutional functions of Congress comprised, not only

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[1] Act Feb. 14, 1865, 13 Stat. 428. See *Daly* v. *National Insurance Co.* (1878), 64 Ind. 1.

[2] Act March 3, 1865, 13 Stat. 510.

[3] Act July 27, 1854. See *Close* v. *Cemetery Co.* (1882), 107 U. S. 466. Congress has also incorporated a municipal board for the local government of the District. See *Stoutenburgh* v. *Hennick* (1888), 129 U. S. 141.

[4] *Daly* v. *National Ins. Co.* (1878), 64 Ind. 1.

[5] 4 Wheat. 316.

those powers expressly conferred, but also all appropriate means for carrying those powers into execution. Nowhere in the Constitution is there a specific grant of the power to incorporate, and accordingly, if such a power does exist, it must be as a means of exercising some other power or powers.

Little assistance is obtained from the record of the proceedings in the Constitutional convention. It appears that a proposition was made in that body to authorize Congress to open canals and an amendatory one to empower it to grant charters of incorporation in cases where the public good might require them, but the motion was defeated. It is uncertain whether the cause for the defeat lies in the fact that such power was regarded as already given, or for other reasons, and both Hamilton and Randolph, in submitting their opinions to Washington on the constitutionality of the national bank, agreed that no weight could be attached to those proceedings.[1]

In 1790, the year after the first Congress assembled, a charter was granted by Congress to incorporate a national bank. Before signing the bill, Washington requested the opinion of the members of the Cabinet on the constitutionality of the act of incorporation. Jefferson and Randolph denied the federal power to incorporate, but Hamilton, whose opinion prevailed, favored it, he being the first to advance the doctrine, later adopted by the Supreme Court, known as the doctrine of implied powers.[2] The name is perhaps unfortunate, as the doctrine merely signifies that Congress has a right to a choice of means when executing its enumerated powers.

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[1] Jefferson, however, argued that the motion was defeated because it was not thought desirable to vest in Congress the power to incorporate.

[2] Hamilton's Works (Putnam), Vol. 3, p. 445.

The Supreme Court did not pass upon the constitutionality of the national bank until 1819, in the case of *McCullough* v. *Maryland*,[1] in which the court upheld the validity of the act of incorporation. "The Constitution," said Chief Justice Marshall, "does not profess to enumerate the means by which the powers it confers may be executed, nor does it prohibit the creation of a corporation, if the existence of such a being be essential to the beneficial exercise of those powers. The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished. . . . No city was ever built with the sole object of being incorporated, but is incorporated as affording the best means of being well governed. The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. No sufficient reason is, therefore, perceived, why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them."

This case, therefore, definitely established the principle that Congress, though not expressly given the power to incorporate, may exercise such power if it be a means of carrying into execution a power which is expressly conferred by the Constitution. Nor does it have to be an absolutely necessary means, without which the power granted would be nugatory, as was argued by Jefferson in his opinion submitted to Washington. "Necessary and proper," as the phrase is used in the Constitution,

[1] 4 Wheat. 316.

is to be construed in a broad sense.[1] "The sound construction of the Constitution," said Marshall, "must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

Does, then, the principle of this case authorize the creation by Congress of corporations to carry on interstate commerce, such as transportation companies and trading companies? Is the incorporation of these companies an appropriate means of executing the complete power of Congress over commerce?

It was not until 1862 that corporations were chartered by Congress under the commerce power. In 1806, Congress authorized the construction of the Cumberland Road from the Potomac to the Ohio rivers, but it was stipulated that the consent of the States through which the road was to pass should be obtained. No corporation was created by Congress for the purpose. The power even to authorize the construction of the road was doubted by many, but was never passed upon by the Supreme Court. After the Wheeling bridge had been adjudged to be a nuisance, Congress, in 1852, passed an act declaring it a lawful structure, and it was

[1] The Constitution provides, "The Congress shall have power — To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

held that this was within the power to regulate commerce.[1] Here also there was, of course, no actual incorporation.

But in 1862, in pursuance of a plan to establish a highway from the Missouri River to the Pacific Ocean, the Union Pacific Railroad was incorporated, with power to construct a railroad and telegraph line from a point in the then territory of Nebraska to the western boundary of the territory of Nevada. It appears that in the construction of this continuous line to the Pacific Ocean, Congress did not create a corporation to operate within the limits of a State, but only within the territorial jurisdiction of the United States, while state-created corporations were granted additional franchises and aids by the Federal Government with the consent of the State which created them. From this fact it has been argued that Congress was acting merely as the legislature for the Territories, and not under its commerce power. But this position cannot be maintained. A corporation created by Congress in a Territory becomes a state corporation

[1] *Pennsylvania* v. *Wheeling Bridge Co.* (1855), 18 How. 421. By the act of Sept. 19, 1890, c. 907, 26 Stat. 426, 453, Congress provided that no bridge should be constructed over navigable waters of the United States until the location and plan should be approved by the Secretary of War. See *Lake Shore, etc., Ry.* v. *Ohio* (1897), 165 U. S. 365.

In 1866 Congress passed a statute granting to any telegraph company organized under the law of any State the right to construct and maintain lines of telegraph through and over any portion of the public domain, over and along any of the military and post-roads of the United States, and over, across, or under any of the navigable streams of the United States. In *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.* (1877), 96 U. S. 1, this act was held to be a valid exercise of the commerce power, and a statute of Florida which granted exclusive telegraph privileges within the State to one company was held unconstitutional as in conflict with the act of Congress.

upon the admission of the Territory as a State,[1] while the corporations created by Congress to build transcontinental railroads have always been regarded as federal corporations. Moreover, the Texas and Pacific Railroad, incorporated by Congress, in 1871, was authorized to construct and maintain a railroad from a point in the State of Texas to connect with another railroad in California. Texas passed an act, in 1873, accepting the railroad, but it does not appear that this was necessary to validate the construction of the road.[2] The decisions in the Supreme Court relating to the establishment of this system of railroads justify the creation of the corporations principally upon the commerce power of Congress. In *California* v. *Pacific Railroad Co.*[3] it was said: "It cannot at the present time be doubted that Congress, under the power to regulate commerce among the several States, as well as to provide for postal accommodations and military exigencies, had authority to pass these laws. The power to construct, or to authorize individuals or corporations to construct, national highways and bridges

[1] *Kansas Pacific Railroad* v. *Atchison, etc., Railroad Co.* (1884), 112 U. S. 414. In this case the corporation was chartered by the territorial legislature, but it seems clear that the principle would be the same where Congress itself acted as the territorial legislature.

[2] The Northern Pacific Railway Company was chartered by Congress in 1864 and authorized to construct a railway and telegraph line from a point in the State of Minnesota or the State of Wisconsin to a point west of Puget Sound. The charter contained the provision that no road should be constructed within a State without the consent of the State. In 1866, the Atlantic and Pacific Railroad Company was chartered by Congress, being authorized to construct a railway and telegraph line from a point in the State of Missouri to the Pacific Ocean.

[3] (1887), 127 U. S. 1.

from State to State is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. The power in former times was exerted to a very limited extent, the Cumberland or National Road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed, and led to the conclusion that Congress has primary power over the whole subject. Of course the authority of Congress over the territories of the United States, and its power to grant franchises exercisable therein, are, and ever have been, undoubted. But the wider power was very freely exercised, and much to the general satisfaction, in the creation of the vast system of railroads connecting the East with the Pacific, traversing States as well as Territories and employing the agency of State as well as federal corporations."

In *Luxton* v. *North River Bridge Co.*[1] the power of Congress to incorporate a company to construct a bridge across the Hudson or North River was sustained. In this case the court said, "Congress may incorporate as an appropriate means of executing the powers of government, as, for instance, a bank for the purpose of carrying on the fiscal operations of the United States, or a

[1] (1894), 153 U. S. 525.

railroad corporation for the purpose of promoting commerce among the States."

From these cases it seems to be settled that Congress, under its power to regulate commerce, can incorporate bridge or railroad companies.

And it also seems beyond question that to enable such a company to carry out its operations, the power of eminent domain may be conferred upon it to be exercised within the limits of a State, even against the consent of the State.[1] In the case last cited, the Bridge Company, a corporation created by Congress, petitioned for the appointment of commissioners to assess damages for the appropriation and condemnation of land owned by a citizen of New Jersey, the land to be used as an approach to the bridge. In granting the petition the court said, "And whenever it becomes necessary, for the accomplishment of any object within the authority of Congress, to exercise the right of eminent domain and take private lands, making just compensation to the owners, Congress may do this, with or without a concurrent act of the State in which the lands lie."

A railroad company is engaged in transportation. Transportation between the States is commerce within the regulating power of Congress. But "commerce among the several States" comprises more than the mere act of transportation. A contract which in its performance involves transportation from one State to another is a commercial transaction which is also subject to the jurisdiction of Congress.[2] A corporation which in the

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[1] *Kohl* v. *United States* (1875), 91 U. S. 368; *Cherokee Nation* v. *Kansas Ry.* (1889), 135 U. S. 641; *Luxton* v. *North River Bridge Co.* (1894), 153 U. S. 525.

[2] *Robbins* v. *Shelby Co.* (1886), 120 U. S. 489; *Addystone Pipe and Steel Co.* v. *United States* (1899), 175 U. S. 211; *Stockard* v. *Morgan* (1901), 185 U. S. 27; *Rearick* v. *Pennsylvania* (1906), 203 U. S. 507. See *post*, page 199

course of its business enters into such contracts and ships its products to other States in pursuance thereof, although it does not engage in the actual transportation itself, is just as much engaged in the prosecution of interstate commerce as is the railroad which conveys the goods.

Congress has the power to incorporate a railroad company as a means of regulating that commerce which is transportation. Should it not have the same power to incorporate a trading company as a means of regulating that commerce which consists in buying and selling between the States? Can it be said that the means, though appropriate in the first instance, are not so in the second? It must be remembered that the means employed need not be absolutely necessary. Congress must be allowed that discretion which will enable it to perform its duties in the manner most beneficial to the people. Considering this, it can hardly be denied that the granting of corporate privileges to individuals to be exercised in the purchase and sale of articles among the States would be well within the complete power over interstate commerce which is vested in Congress by the Constitution.

The trusts have become national in character, carrying on business in many different States, and practically all of them are engaged in interstate commerce. This is not, however, an essay on the economical desirability of federal incorporation. Many economists believe that the individual States should continue to charter companies to engage in interstate commerce; that a change to federal incorporation would centralize too great power in the Federal Government. Others contend that such corporations can enter foreign States to exercise their functions without the necessity of complying with the requirements of those States with reference to foreign corporations, and thus the corporate policy of one State is forced upon the others; that by predatory competition

and unfair discrimination, many large corporations have acquired practical monopolies in staple articles so that they alone regulate the output and the price, and that effective regulation is out of the question under the present system of diverse State laws.

But however the question may be decided from an economic standpoint, constitutionally there seems no valid objection. Federal incorporation is not the only means of regulation, and it may not be the most desirable, but it is certainly within the principle pronounced by Chief Justice Marshall, which has never been qualified: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." Can it be denied that the granting of peculiar privileges to be employed by individuals in the conduct of a business is not a means of regulating that business?

It has been contended that interstate railroads may be incorporated, because that business is public in character, and the Federal Government could, if it thought fit, acquire and conduct the entire business itself; but that it would not be within the power of Congress to incorporate a business which lacked this element of public interest. This position, however, appears unsound. The public character of the business of a railroad may make it more necessary or more desirable that the company be incorporated by Congress, but the absence of this quality cannot destroy the appropriateness of incorporation as a means of regulating commerce. In view of the plenary power over interstate commerce which the Supreme Court has many times declared is vested in the Federal Government, it is inconceivable that Congress may not itself prescribe the corporate

privileges which shall be employed in the transaction of any part of that commerce, whether it be interstate transportation or buying and selling between the States.

If, then, it would be appropriate for Congress to incorporate trading companies to engage in interstate commerce, it becomes necessary to determine the exact privileges which such a corporation would have. Could it, in addition to its interstate business, buy and sell entirely within the limits of a State? Could the power to produce be granted by Congress as incidental to the power to make interstate sales?

After the decision in *McCullough* v. *Maryland*,[1] Ohio taxed the operations of a branch of the Bank of the United States, claiming that the bank was not only engaged in business for the United States Government, but also carried on a private banking business. In the case of *Osborn* v. *Bank*,[2] this tax was held unconstitutional, the court expressly declaring that the national bank had the right to carry on a private banking business, because otherwise it would not be an effective means or instrument to enable the government to carry out its power over fiscal matters.

By analogy, a federal trading corporation would have the right to make intrastate purchases and sales if this right would be necessary to make the company a capable instrument for the transaction of an interstate business.

That such would be the case seems unquestionable. The distinction between interstate and intrastate commerce, as determined by State boundary lines, is wholly artificial and not founded on any distinction in the trade itself. Undoubtedly the operations of a corporation engaged in interstate commerce would be materially

[1] 4 Wheat. 316

[2] (1824), 9 Wheat. 738.

burdened if the added privilege of carrying on a local business were denied. The Pacific railroads incorporated by Congress engage in transportation wholly within the limits of a single State. It is true that the States traversed by the railroads agreed to admit them, but without such consent there seems little doubt but that the railroads would have possessed the right. Indeed, the cases dealing with the power of the States to regulate the intrastate rates of these roads incorporated by Congress, not only do not question the right of the company to carry on the local business, but even concede to Congress the power to remove operations therein from the control of the States.[1]

In the recent Kansas cases[2] the opinion of the majority of the court and the concurring opinion of Mr. Justice White make it clear that a State has not absolute control over the intrastate business of a corporation which is also engaged in interstate commerce, and that an arbitrary prohibition of the right to carry on that business would burden the interstate business to an unconstitutional extent.

It may, therefore, be regarded as practically settled that a federal trading company would have the incidental right to carry on a local business within a single State in addition to its interstate transactions. The

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[1] *Reagan* v. *Mercantile Trust Co.* (1894), 154 U. S. 413; *Smyth* v. *Ames* (1898), 169 U. S. 466. See *post*, pages 175–179.

[2] *Western Union Telegraph Co.* v. *Kansas* (1910), 216 U. S. 1; *Pullman Co.* v. *Kansas* (1910), 216 U. S. 56. Mr. Justice White expressly said, "Morever, to me it seems that where the right to do an interstate business exists, without regard to the assent of the State, a State law which arbitrarily forbids a corporation from carrying on with its interstate commerce business a local business would be a direct burden upon interstate commerce." See *post*, pages 142–146

extent to which this business would be subject to the control of the State will be discussed in a later chapter.

A different problem arises when we consider the power of the Federal Government to confer the right to produce as an incident to the power to carry on interstate commerce. There are two questions which must be considered in this connection: (1) Can a federal corporation be given the absolute right to produce against the consent of the State into which the corporation enters to do business? (2) If the Federal Government cannot grant this absolute right, can it confer the corporate capacity to produce, to be exercised if the State does not object?

(1) Mr. Garfield, in his report for 1904 as Commissioner of Corporations, argued that the Federal Government could grant to a federal corporation the absolute right to produce, irrespective of the consent of the State in which the production is undertaken, because such a power is a necessary and absolutely essential incident to the right to engage in interstate commerce. The two functions of production and exchange, he says, are inseparable from an economic standpoint; the subordinate power to produce is a natural and *prima facie* corollary of the power to exchange, and a natural part of the constitutional machinery for the regulation of commerce. He points out the fact that national banks have many incidental powers which are not strictly necessary for the carrying on of a banking business, as, for example, the right to buy and sell exchange, coin, and bullion, to hold land for debts, and to discount notes, drafts, and bills of exchange. Once granting the propriety of the general power to regulate interstate commerce by conferring corporate privileges to be exercised therein, he argues, it necessarily follows that the discretion

of Congress in the matter is very broad, reaching to every means, form, incidental, and detail not plainly prohibited.

But this argument, it is believed, carries the doctrine of *McCullough* v. *Maryland* too far. Production has been definitely decided not to be a part of interstate commerce.[1] Production is the creation of an article, and Congress has not the power to *create* the articles which may become the subject of interstate commerce, but merely to *regulate* that commerce. If the creation of the thing to be regulated is an incident of the power to regulate, then it would seem that the power to produce can be derived as incidental to nearly any one of the powers of Congress. Thus, since Congress has the power to lay taxes, why could it not produce the objects to be taxed, as an appropriate means of exercising such power? The power to sell usually accompanies the power to produce, but this is because it is incidental to the right of ownership, and it does not by any means follow that the power to produce is incidental to the power to exchange. It is believed, therefore, that Congress has no power to confer the legal right to produce within a State as an incidental means of regulating interstate commerce.[2]

(2) But although this argument leads us to the conclusion that Congress cannot grant the legal right to produce within a State, can it give to its own corporation the corporate capacity to produce, to be exercised with the consent of the State where production is undertaken?

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[1] *Kidd* v. *Pearson* (1888), 128 U. S. 1; *United States* v. *E. C. Knight Co.* (1895), 156 U. S. 1.

[2] For an excellent discussion of this question see an article by Mr. Wilgus, on "Federal License or Incorporation," 3 *Mich. L. Rev.* 264.

It must be remembered that Congress as the national legislature has not the same sovereign power as a State to charter corporations. The corporation must be created as a means of executing some express power, and, therefore, the corporate powers granted must bear some relation to the end to be accomplished. Since manufacturing or production is not a part of interstate commerce nor of any other express power vested in Congress, at first glance it would appear that Congress had no power to grant such corporate capacity.

But it must also be remembered that Congress has complete sovereign power over a certain section of the country, — the Territories and the District of Columbia. Within this section the granting of the corporate capacity is not limited to the accomplishment of a power expressly conferred upon Congress by the Constitution. It is entirely within the power of Congress to incorporate a company to engage in production in either the Territories or the District of Columbia.

Since this is true, no constitutional objection can be perceived which would prevent Congress, in granting a charter to engage in interstate commerce, from also conferring the legal right to produce which could be exercised within the Territories and the District of Columbia. The corporation would thus have an existence as a national corporation engaged in interstate commerce, in which character it could not be excluded by a State, and as a producing corporation of the District of Columbia and the Territories, in which character it could be excluded by a State. That is, the function of interstate commerce could be exercised regardless of the consent of the State which is entered by the corporation; but the function of production, on the contrary, would be dependent upon the consent of the State where the production is undertaken. To this

extent, and to this extent only, it is submitted, has Congress the power to grant the right to produce.

The power of Congress, in creating a trading corporation, to lay restrictions upon the organization, conduct, or management of the corporation seems unquestionable. It was not doubted in the formation of the system of transcontinental railroads by Congress. In *United States* v. *Stanford*,[1] it was said that Congress, in granting a franchise to a State corporation, could, if it chose, make the stockholders individually liable for the obligations of the corporation. *A fortiori* could it impose such liability upon the stockholders of a corporation of its own creation, and the right to prescribe similar conditions with reference to the exercise of the corporate privileges in interstate commerce would follow.

To summarize: Congress, as an appropriate means of regulating commerce among the States, can incorporate not only railroad and bridge companies, but also trading companies. As an incidental right, a federal trading corporation could make intrastate sales. It could also be given the corporate power to produce, which could be exercised as a legal right in the District of Columbia and the Territories, and which could also be exercised within a State, if the laws of the State did not deny such right.

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[1] (1896), 161 U. S. 412, 433.

CHAPTER III.

INCORPORATION UNDER POWERS OTHER THAN THAT OVER COMMERCE.

We have concluded that, as a means of exercising its power over commerce, Congress could incorporate companies to engage in that commerce. It remains to be considered whether the power to incorporate could be exercised under other clauses of the Constitution, and if so, whether it would be of any practical importance so far as a general incorporation act is concerned.

Here, as in the discussion of incorporation under the commerce clause, it is really a question of the extent to which the principle of *McCullough* v. *Maryland*[1] can be carried. The granting of a charter is never an ultimate purpose in itself; it is never the end in view, but is merely a means of accomplishing some other purpose or end.

Unquestionably, a grant of corporate powers would be an appropriate means of carrying into execution certain others of the powers conferred upon Congress than those over fiscal matters, under which the bank was incorporated, and the commerce power, upon which mainly was justified the incorporation of the transcontinental railroads. Thus Hamilton, in his letter to Washington favoring the constitutionality of the national bank, suggested that a corporation might be created in relation to the collection of taxes.[2] Similarly, the Post-Office might be incorporated, or the Mint.

Granting, however, the constitutionality of legislation of this character by Congress, it would be of no

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[1] 4 Wheat. 316.

[2] Hamilton's Works (Putnam), Vol. 3, p. 445.

importance for our present purposes. A corporation created under the taxing power could be given only those rights which would be necessary to enable it to assess and collect the taxes levied by the National Government. No question of incidental powers could arise, as in the case of the national bank or of a corporation chartered to engage in interstate commerce. Accordingly, there would be no grounds for justifying the enactment of a general incorporation law by a reference to the taxing power. A similar conclusion must be reached with regard to the incorporation of the Post-Office or the Mint.

Under the power to establish post-roads, also, Congress might grant charters of incorporation. The practice of Congress in exercising this power has been to adopt State roads as the route over which the mail should be carried. Indeed for some time after the adoption of the Constitution there was considerable doubt whether Congress had the power to do more than designate the roads which should be used as post-roads. But the better view undoubtedly is that Congress, if it deems it necessary and proper, may authorize the construction of a road for postal purposes.[1] Incorporation would certainly be an appropriate means of exercising this power. In fact, the system of transcontinental railroads established by Congress, although justified chiefly by the power over interstate commerce, is also supported by the power to establish post and military roads. But the only companies which could be incorporated under this clause would be those which could appropriately be employed to carry the mails, and an attempt to pass a general incorporation law for trading or industrial companies would clearly exceed the power of Congress.

[1] See 2 Story, secs. 1124–1150.

More difficult questions arise in connection with the power to raise and support an army and to provide and maintain a navy. It is necessary in properly equipping an army or navy to supply vessels, arms, uniforms, and the like. There is no question but that the Federal Government can itself make these necessary articles; in fact, this is what is done at the present time to a very considerable extent. There also seems little doubt that Congress could, in its discretion, incorporate a company as a means of procuring these supplies.

If this be true, the question would then arise as to the right of the corporation to manufacture and sell its articles to private individuals within the State in which it had established its business, and if it did possess this right, to what extent it could be exercised. As we have seen, a national bank, in addition to the duties it performs for the Federal Government, carries on a private banking business, and it has been held that this is a necessary incidental right. So also the railroads incorporated by Congress engage in transportation wholly within the limits of a single State; and we have concluded that a federal interstate trading company would have the incidental right to transact an intrastate business. It might well be that a corporation created to supply clothing to the Army and Navy could not perform these duties satisfactorily unless it were allowed to carry on a private business. Under such circumstances, it seems difficult to escape from the conclusion that the reasoning applied in the case of the national bank would also justify the carrying on of a private manufacturing business by such corporation as we have supposed.

But if Congress should abuse this power, and attempt to gain control of occupations now under State control, the remedy would lie in the hands of the Supreme Court. That tribunal will not question the motives of Congress

when an act is a clear exercise of an express power,[1] but the purpose or end of the legislation in question will be investigated to determine if it is actually within the express power. The mere fact that Congress declares that the end is within an express power will not prevent the court from questioning this, and if the real purpose is to reach subjects which are beyond the power of Congress, the act will be declared unconstitutional. Thus, in sustaining the power to incorporate the bank, Chief Justice Marshall said: "But, were its necessity less apparent, none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been very justly observed, is to be discussed in another place. Should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land; but when the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground." [2]

Thus, if Congress should incorporate manufacturing companies generally, declaring its purpose to be the furnishing of supplies to the army and navy, it would be clear that the real object was not the execution of this power, but the attainment of an end not within any power vested by the Constitution in the Federal Government.

Similarly, it might be argued that the Federal Government could itself go into a private business as a means

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[1] *McCray* v. *United States* (1904), 195 U. S. 27.

[2] *McCullough* v. *Maryland*, 4 Wheat. 316, 423.

of raising revenue, and if so, companies might be incorporated for this purpose. A State, for example, as a sovereign power, may engage in a private business.[1]

But, in the first place, it seems doubtful if the Federal Government can enter a private occupation for the purpose of raising revenue. A State has all the sovereign powers which are not prohibited by the Constitution of the United States, or by its own constitution, and it can raise revenue by carrying on a business for itself, because it is nowhere prohibited to do so. But the Federal Government has only those powers which are conferred upon it by the Constitution, and nowhere in that instrument is it authorized to engage in a private business. It is granted the power to raise revenue, but the method is specified — by taxes, duties, imposts, and excises; and, in view of this, it is doubtful if it could be said that entering a private occupation would also be an appropriate means for the government to employ.

But, granting that it would be, it would afford no justification for a general federal incorporation act. It might be within the power of Congress to incorporate a company in which the United States owned all the stock, but the problem would be entirely different if a bare majority or only one share of stock was retained by the government, and the remainder purchased by private individuals. The only practical method of incorporating generally would be for the government to own a very small number of shares, and if legislation providing for this were enacted by Congress, it could hardly be contended that the end was to raise revenue for the United States. It would clearly be an unconstitutional attempt to extend the power of Congress under the pretext of exercising one of its legitimate powers.

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[1] *Vance* v. *Vandercook County* (1887), 170 U. S. 438.

Upon the whole, therefore, we are led to the conclusion that under no power other than that over interstate commerce can a practical working incorporation act be justified.

CHAPTER IV.

METHODS OF OBTAINING COMPULSORY FEDERAL INCORPORATION.

Granting that federal incorporation would be an effective means of regulating the interstate commerce transacted by corporations, the question arises whether Congress could make this incorporation compulsory.

It has been contended that this step would be unnecessary — that corporations would voluntarily avail themselves of the opportunity to become established on a secure basis, free from State interference; that investors and customers would naturally prefer to deal with a business sanctioned by the Federal Government.

But, while this would be true to a certain extent, it must be remembered that a federal incorporation law, in placing interstate commerce on a more secure and definite basis, would have for its object, not only the removal of corporations engaged in such commerce from diverse and conflicting State laws, but also the improvement of the corporation itself — the protection of those dealing with it from the abuse of corporate privileges, from overcapitalization, lack of publicity, and the like. As a result, there would be features objectionable to promoters and incorporators which the advantages of federal incorporation would not, in many cases, overcome. And therefore, in these cases, incorporation, as at present, would still be sought in those States whose laws are most lax and favorable to the incorporators and promoters.

Accordingly, the question must be considered whether it is within the power of Congress to require all

corporations engaged in interstate commerce to procure a federal charter. Several methods have been suggested, by each of which it is contended that this result can be accomplished by Congress without any violation of the Constitution:

1. The articles manufactured or otherwise produced by State corporations may be excluded from the channels of interstate commerce.

2. All corporations not incorporated by Congress may be prohibited from engaging in interstate commerce.

3. A prohibitive tax may be imposed upon the interstate business transacted by State-chartered corporations.

4. State corporations which carry on interstate commerce may be denied the use of the mails.

The constitutionality of each of these proposed methods will be discussed in the order named.

First Method: Exclusion of the Products of State Corporations from Interstate Commerce.

To determine if this power resides in Congress it is necessary to decide two questions: (1) Does the power to regulate include the power to prohibit? (2) If this be answered in the affirmative, is there any other clause in the Constitution which limits the power of Congress to enact the legislation under consideration?

Upon the first question there has been and is much difference of opinion. There are three possible ways of viewing the power in the hands of Congress:—

(1) The broad view that standing by itself the power is complete and absolute, and confers upon Congress entire jurisdiction over interstate commerce. In other words, the same power which prior to the adoption of the Constitution existed in the individual States, is by

this clause vested in the Federal Government. It therefore includes the power both to license and to destroy. The only limitations upon the exercise of the power, if any, are to be found in other parts of the Constitution, and not in the grant of the power itself.

(2) The power is limited by the very nature of the word "regulate," which presupposes the existence of a commerce to be regulated, and falls short of the power to put an end arbitrarily to that commerce. To regulate is merely to prescribe the rules by which an existing commerce shall be carried on, and it is necessarily not a regulation to destroy the very thing which is to be regulated. Under this view a prohibition would be valid only when calculated to facilitate or protect interstate commerce itself; as, for example, the exclusion of diseased cattle.

(3) The intermediate view that, while the power to regulate does not include the power to destroy arbitrarily, yet since it is a power conferred upon a sovereign nation, it vests in that sovereign a complete police power over the subject to be regulated. Therefore, not only would a prohibition be valid which facilitates interstate commerce, but also one which has for its object the protection of the health, morals, and safety of the people, or which is designed to promote the public good.

It cannot be said that the Supreme Court has ever definitely and finally adopted any one of these views. The legislation which we are considering, — the exclusion from interstate commerce of legitimate articles because of their production by State corporations, — is undoubtedly within the first view. It is equally certain that it is not within the second view, since it cannot be said to facilitate or protect the free passage of other

articles through the channels of interstate commerce. To be a regulation within the third view, it is necessary that the act be a valid police regulation.

The exact scope of the police power is a matter of great uncertainty. Where State legislation is in question, it is certain that the protection of the health, morals, and safety of the public is within a legitimate exercise of this power. But from recent decisions in the Supreme Court it may safely be asserted that any measure passed for the immediate and actual good of the public is comprised within the scope of the police power.[1] Accordingly, if Congress should, as a matter of public policy, declare that all corporations which had grown beyond a certain size were dangerous to the property interests and the welfare of the community, and should exclude their products from interstate commerce, it might be that such legislation would be within the police power. But it will be safer to conclude that a broad prohibition extending to the articles produced by all State corporations, of whatever size, would not be so clearly a measure for the immediate and actual good as to be within the power of police.

Therefore, unless the first view be adopted, the prohibition in question would not be within the constitutional power of Congress over commerce. If it be admitted that the first view is correct, the act would be a regulation of commerce, but the further question will remain whether it would be of such a character as to be prohibited by other parts of the Constitution. Before attempting any discussion of this question it is of course necessary to examine the actual cases in which Congress has exercised a prohibitory power over interstate

[1] *Noble State Bank* v. *Haskell* (1911), 219 U. S. 104; *McLean* v. *Arkansas* (1909), 211 U. S. 539. See *post*, pages 150-152.

commerce, in order to ascertain to which view the Supreme Court is most likely to adhere.

The most important example of prohibition is that furnished by the decision in the *Lottery Case*,[1] in which a majority of the court held that lottery tickets were subjects of commerce, and that Congress, under its power to regulate commerce, could prohibit their carriage between the States. Several illustrations were given by the court of cases in which regulation had appropriately taken the form of prohibition.

(a) *Diseased Cattle:* In the first place, there is no doubt but that Congress may prevent the transportation of diseased cattle from one State to another. In fact, such action has already been taken.[2]

But this establishes no precedent for the prohibition of any legitimate article which is not harmful. Under the decisions of the court, articles infected with disease are not legitimate subjects of commerce, and may even be excluded by a State without interfering with the jurisdiction of Congress over interstate commerce.[3] Such action on the part of Congress is within its power to regulate commerce under any one of the three views taken. The result is to protect and benefit interstate commerce itself by keeping its channels free from diseases which may be harmful to sound articles of commerce.

(b) *Anti-Trust Legislation:* As a second illustration, the Sherman Anti-Trust Act was cited. "The object of that act was to protect trade and commerce against unlawful restraints and monopolies. To accomplish

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[1] (1903), 188 U. S. 321.

[2] Act May 29, 1884, c. 60, 23 Stat. 32. See *Rassmussen* v. *Idaho* (1901), 181 U. S. 198; *Reid* v. *Colorado* (1902), 187 U. S. 137.

[3] *Reid* v. *Colorado* (1902), 187 U. S. 137.

that object Congress declared certain contracts to be illegal. That act, in effect, prohibited the doing of certain things, and its prohibitory clauses have been sustained in several cases as valid under the power of Congress to regulate interstate commerce."[1]

But this also is not an example of an absolute prohibition. By declaring illegal all contracts in restraint of trade, the result is clearly to facilitate interstate commerce. The act not only does not prohibit the transportation of legitimate articles, but it removes all contracts or combinations which may obstruct interstate commerce and prevent its free passage. It is a regulation which is likewise within the power of Congress under each of the three views.

(c) *The Wilson Act:* The case of *In re Rahrer*[2] was cited as a third illustration. Prior to the Wilson Act, spirituous liquor had been held to be a legitimate subject of commerce, and the power of a State to prohibit its importation from another State or its sale in the original package was denied. In 1890, by the Wilson Act, Congress provided that upon arrival within a State or Territory all spirituous liquor should become subject to the police power of such State or Territory, and should not be exempt by reason of being in the original package. This act was held constitutional in the case of *In re Rahrer*, and a State law prohibiting the sale of spirituous liquor was held to apply to the sale in the original package of liquor brought from another State. Thus the act of Congress, it is argued, made it impossible to transport liquor into prohibitory States and there dispose of it by sale, which before the act could be done without interference.

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[1] *Lottery Case* (1903), 188 U. S. 321, 359.

[2] (1891), 140 U. S. 545.

This, however, does not appear to be a true example of prohibitory legislation by Congress. A State cannot directly regulate interstate commerce, but in the exercise of its reserved powers laws may be passed which in their operation affect that commerce. The validity of such laws in their effect upon interstate commerce depends upon whether or not they are in conflict with the will of Congress. By the "doctrine of silence," when the subject is of national concern, the will of Congress, as expressed by its silence or inaction, is that the passage of commerce among the States shall be free and unrestricted by State laws.[1] But Congress may break its silence and declare that certain or all laws passed under the reserved powers of the States shall not be invalid because they may incidentally affect interstate commerce. And this is what was done by the Wilson Act. As a result of it, State laws which had been held by the court to be inoperative as applied to the sale in the original package of liquor brought into the State, because in conflict with the law of the United States, were regarded by the Supreme Court as no longer in conflict with the federal law. The legislation of Congress itself did not directly prohibit interstate commerce in any respect.

It might be argued that the so-called "commodities clause" of the Hepburn Act furnishes an example of prohibitory legislation by Congress under the commerce power. In the case of *United States* v. *Delaware and Hudson R. R. Co.*[2] it was held that the effect of this clause was to prohibit the transportation by a common carrier of a commodity in which the carrier had a legal

[1] *County of Mobile* v. *Kimball* (1880), 102 U. S. 691; *Leisy* v. *Harden* (1890), 135 U. S. 100.

[2] (1909), 213 U. S. 366.

interest, direct or indirect, at the time of the transportation.

But it seems equally clear that this is a valid regulation within any view of the power of Congress. There is no prohibition of interstate commerce in any particular commodity, but only of transportation by a carrier which is interested in the commodity. The object is to prevent discrimination in rates and to secure equal service for all.

Thus none of these illustrations furnish precedents for the absolute exclusion of legitimate articles from interstate commerce. They are not inconsistent with any view of the power to regulate possessed by Congress. A step in advance, however, was taken in the *Lottery Case* itself. By that case it appears to be definitely decided that Congress has a power of police over interstate commerce. Lottery tickets were regarded as harmful to the morals of the community, and it was held that their passage through the channels of interstate commerce could be prohibited by Congress. The court, after reviewing the prior adjudications, said:

"They also show that the power to regulate commerce among the several States is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States; that such power is plenary, complete in itself, and may be exerted by Congress to its utmost extent, subject only to such limitations as the Constitution imposes upon the exercise of the powers granted by it; and that in determining the character of the regulations to be adopted, Congress has a large discretion which is not to be controlled by the courts, simply because, in their opinion, such regulations may not be the best or most effective that could be employed. . . .

"If a State, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money, in that mode, why may not Congress, invested with the power to regulate commerce among the several States, provide that such commerce shall not be polluted by the carrying of lottery tickets from one State to another? . . . We should hesitate long before adjudging that an evil of such an appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end. We say competent to that end, because Congress alone has the power to occupy, by legislation, the whole field of interstate commerce. . . . If the carrying of lottery tickets from one State to another be interstate commerce, and if Congress is of opinion that an effective regulation for the suppression of lotteries, carried on through such commerce, is to make it a criminal offense to cause lottery tickets to be carried from one State to another, we know of no authority in the courts to hold that the means thus devised are not appropriate and necessary to protect the country at large against a species of interstate commerce . . . which has grown into disrepute and has become offensive to the entire people of the Nation."

The long quotation seems justified to illustrate the broad attitude with which the court views the power over commerce which is vested in Congress. The decision itself appears entirely sound. It is difficult to perceive why Congress should not possess a complete police power over interstate commerce. The exclusive power of regulation is vested in the Federal Government, and it is right and proper that that government should have all the governmental powers which may be required for complete regulation. It would be a weak power of regulation if the channels of interstate commerce could not

be kept free from matter which is directly harmful to the morals or safety of the country at large. A State cannot exclude from its limits a legitimate subject of commerce, even though it may be detrimental to the morals of the community,[1] and if such a power did not exist in the Federal Government, the agency of interstate commerce could be freely employed, as was declared by the court, to overthrow the declared policy of the States.

Apparently, therefore, the second and narrow view of the power of Congress to regulate commerce has been definitely abandoned by the Supreme Court. A prohibition within the third view would, under the *Lottery Case*, be constitutional. But we have concluded that the prohibition under discussion could hardly be said to be a police regulation. Will the further step be taken and the power to regulate vested in a sovereign government be held to include necessarily the right to prohibit at discretion?

Under the power "to establish post-offices and post-roads," it has been held that Congress may prohibit the transportation of matter through the mails.[2] In delivering the opinion of the court in the case cited, Mr. Justice Field said: "We do not think that Congress possesses the power to prevent the transportation in other ways, as merchandise, of matter which it excludes from the mails. To give efficiency to its regulations, and prevent rival postal systems, it may perhaps prohibit the carriage by others for hire, over postal routes, of articles which legitimately constitute mail matter, in the sense in which those terms were used when the Constitution was adopted, consisting of letters, and newspapers and

[1] See *Leisy* v. *Harden* (1890), 135 U. S. 100; *Schollenberger* v. *Pennsylvania* (1898), 171 U. S. 1.

[2] *Ex parte Jackson* (1877), 96 U. S. 727.

pamphlets, when not sent as merchandise; but further than this its power of prohibition cannot extend." This dictum was approved in the later case of *In re Rapier*.[1]

In the *Lottery Case*, in answer to the argument that if Congress could exclude lottery tickets, the principle would lead necessarily to the conclusion that any article, of whatever kind or nature, could be excluded, regardless of the motive of Congress, Mr. Justice Harlan said: "It will be time enough to consider the constitutionality of such legislation when we must do so. The present case does not require the court to declare the full extent of the power that Congress may exercise in the regulation of commerce among the States. We may, however, repeat, in this connection, what the court has heretofore said, that the power of Congress to regulate commerce among the States, though plenary, cannot be deemed arbitrary, since it is subject to such limitations or restrictions as are prescribed by the Constitution. This power, therefore, may not be exercised so as to infringe rights secured or protected by that instrument." [2]

From this the conclusion may be drawn that, since the power over interstate commerce is plenary, it may take the form of absolute prohibition; that the only restrictions upon its exercise are to be found, not in the grant of the power itself, but in other parts of the Constitution. In the *Northern Securities Case*, the court said, "Is there, then, any escape from the conclusion that, subject only to such restrictions, the power of Congress over interstate and international commerce is as full and complete as is the power of any State over its domestic commerce?" [3] Unquestionably, a State has absolute

[1] (1892), 143 U. S. 110, 133.

[2] 188 U. S. 321, 362.

[3] (1903), 193 U. S. 197, 342.

power over its domestic commerce and could exercise this power by prohibition if there were no constitutional restrictions upon its exercise. And there is undoubtedly a strong tendency noticeable in the decisions of the Supreme Court to regard the commerce clause as a transference to the Federal Government of the same power which, prior to the adoption of the Constitution, was vested in the individual States.

Moreover, it is difficult to perceive why this view is not sound. Prior to the Constitution the States had complete control over interstate commerce. The power to regulate was granted to the Federal Government, and if this did not vest in Congress as complete control as the States formerly had, what became of the residue? It certainly does not remain in the States, and yet the only clause removing any power from the States is that which grants to Congress the power to regulate. If the power to regulate does not include the power to prohibit, why should not the power to prohibit interstate commerce remain in the States, and Congress merely have the power to prescribe rules for such commerce as the States permit to be carried on? It is submitted that the better view is, that the plenary power which the grant to a sovereign government of an exclusive power to regulate vests in that government should amount to full control over the subject to be regulated, including the right to prohibit when the legislative body deems it necessary.

The power over interstate commerce is granted in the same words as that over foreign commerce, and it is settled that the latter power is complete, and may extend to prohibition, as is illustrated by the non-importation and embargo laws.[1] The Supreme Court has said many times, that "the power to regulate commerce among the

[1] See *Buttfield* v. *Stranahan* (1904), 192 U. S. 470.

several States is granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations." [1] Therefore, so far as the grant of the power itself is concerned, no reason can be perceived why it does not include the power to prohibit to the same extent as does the power to regulate foreign commerce.

But it does not necessarily follow that, because a prohibition may be a regulation of commerce, therefore Congress has absolute power to prohibit interstate commerce in any legitimate article of commerce. At the present time, as we have intimated, it cannot be doubted that the exercise of the commerce power is subject to the restrictions and limitations imposed upon the Federal Government by other provisions of the Constitution.[2] Is there, then, any such limitation or restriction which would render unconstitutional the exclusion from interstate commerce of articles of commerce solely because of the fact that they have been produced by State corporations?

The only limitations which seem to have any application are those to be found in the Fifth Amendment. There are two rules in that amendment designed to protect property:

"No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

A prohibition of the transportation of property in interstate commerce is clearly not a taking of property

[1] *Brown* v. *Houston* (1885), 114 U. S. 622, 630. See also *Bowman* v. *Railway Co.* (1888), 125 U. S. 465, 482; *Crutcher* v. *Kentucky* (1891), 141 U. S. 47, 58; *Pittsburg Coal Co.* v. *Bates* (1895), 156 U. S. 577, 587; *Lottery Case* (1903), 188 U. S. 321, 351.

[2] *Monongahela Navigation Co.* v. *United States* (1893), 148 U. S. 312; *Interstate Commerce Commission* v. *Brimson* (1894), 154 U. S. 447.

for public use without just compensation within the meaning of the amendment. Therefore the only relevant clause is that which prohibits a deprivation of life, liberty, or property without due process.

If the question were new it might be argued that this clause was meant to prevent arbitrary or illegal oppression by the executive or judicial branches of the government only, and not by the operation of a law duly passed by the legislature. The clause is undoubtedly derived from that part of Magna Charta which provided:

"No free man shall be seized, or imprisoned, or dispossessed, or outlawed, or any way destroyed; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers, or by the laws of the land."

The terms "due process of law" and "laws of the land" would appear to be practically synonymous. It is clear that the clause in Magna Charta was intended as a restraint upon the action of the king only, and did not in any way impede the action of Parliament. And it may well be that the framers of the amendment had the same idea in view; that they intended to express the principle that the Federal Government was a government of laws and not a government of men. This question, however, is no longer open, but has been definitely decided. In the early case of *Murray* v. *Hoboken Land Co.*,[1] it was said: "The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will." Apparently, the strongest argument in favor of this position is that while in England the action of Parliament is unrestrained, the provisions of Magna

[1] (1885), 18 How. (U. S.) 272.

Charta not limiting or defining the functions of that body, so that, theoretically, no law is beyond the scope of its powers, yet this is not true in the United States; here the Federal Government was created by the Constitution, and the functions of each department were expressly defined, and accordingly, each limitation or restriction applies to each department of that government, unless a contrary intention appears in the context of the limitation or restriction.

But though it is therefore settled that the clause operates as a restraint upon the legislative action of Congress, yet, in the absence of direct decision, it may be contended very plausibly that this is only true so far as legislation upon matters of procedure is concerned. Unquestionably, a broader construction has been given to the same clause in the Fourteenth Amendment. That amendment operates as a restraint upon the action of the States, and it has been held to prevent an arbitrary deprivation of property, although the law which has this effect has no relation to judicial proceedings. But to this it may be answered that the setting of the "due process" clause in the Fifth Amendment is different from that in the Fourteenth. The Fourteenth Amendment deals with the question of citizenship of the United States and with the rights of such citizens and the rights of persons within the individual States. The other clauses of the Fifth Amendment, on the other hand, deal entirely with matters of administrative justice.

But although it does not appear that this point has been discussed in any case, there seems little doubt but that the words in the Fifth Amendment would be given the same construction which has been adopted in the Fourteenth Amendment. In cases dealing with the latter, it has been said that the phrase is the same as that in the earlier amendment, except, of course, that

the restriction is upon the States instead of the Federal Government.[1] Therefore it is much safer to assume that the Supreme Court would hold that any legislation by Congress, even though not relating to matters of administrative justice, must conform to the requirement of due process.

Admitting this, what, then, is the test by which we may decide whether a particular act of Congress does or does not violate the prohibition? Or, to put the question in another way, unquestionably Congress has a wide discretion to change old laws or enact new ones, but how far is this discretion governed by the fact that all persons within the jurisdiction must be accorded due process of law?

It is not possible from an examination of the cases to obtain a definite conception of due process, from which it can be ascertained in advance with certainty whether or not a given law is objectionable to the clause. It seems clear, however, from an examination of the decisions interpreting the clause in the Fourteenth Amendment, that the purpose of the limitation is to protect the individual from an arbitrary exercise of the powers of government, from legislation which affects private rights and which shocks existing conceptions of what is fundamentally fair and right. Some of the definitions which occur most frequently are as follows:

"Due process of law within the meaning of the Fourteenth Amendment is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government.[2]

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[1] *Slaughter House Cases* (1872), 16 Wall. 36; *Tonowanda* v. *Lyon* (1901), 181 U. S. 389, 391; *Twining* v. *New Jersey* (1908), 211 U. S. 78.

[2] *Giozza* v. *Tiernan* (1893), 148 U. S. 657, 662. See also *Yick Wo* v. *Hopkins* (1886), 118 U. S. 356; *Dent* v. *West Virginia* (1889),

The words "due process of law" "were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." [1]

"The great purpose of the requirement (due process of law) is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen." [2]

All rights of life, liberty, and property are held subject to laws passed by the sovereign for the public good. As a result there may be many cases of what may be regarded as a deprivation of such rights, which are not prohibited by the Fifth Amendment. Illustrations of this are furnished by the operation of laws passed under the police power, the power of eminent domain, and the taxation power. It is an unjust, arbitrary exercise of the powers conferred upon Congress which is prevented by the necessity of due process.

With these principles in mind, let us consider the exact result of legislation by Congress which prohibits the transportation in interstate commerce of all articles produced by State corporations.

As the result of such a statute, not only would State corporations be prohibited from directly shipping their productions between the States, but the prohibition would also apply to individuals who had purchased such commodities from the State corporations. No matter how far removed from the corporation the goods might be, the fact that they were originally produced by such

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129 U. S. 114, 124; *Leeper* v. *Texas* (1891), 139 U. S. 462, 468; *Yesler* v. *Commissioners* (1892), 146 U. S. 646, 655; *Duncan* v. *Missouri* (1894), 152 U. S. 377, 382.

[1] *Bank* v. *Okely* (1819), 4 Wheat. 235, 244; *Twining* v. *New Jersey* (1908), 211 U. S. 78, 101.

[2] *Dent* v. *West Virginia* (1889), 129 U. S. 114, 124.

a body would prevent their transportation at any time through the channels of interstate commerce.

If the statute should be unconstitutional as applied to the prohibition of the goods in the hands of individuals, it would be unconstitutional in its entirety. Unless a federal statute is clearly separable, the Supreme Court will not hold it constitutional in part and unconstitutional in another part.[1] So here it would seem apparent that the law in question would be in its nature inseparable, and the court could not divide its provisions and hold the prohibition constitutional with reference to articles shipped directly by State corporations, and unconstitutional when applied to the goods in the hands of individuals at the time of the shipment. The constitutionality of the statute will therefore first be considered, viewing it in its most objectionable sense, as applied to the transportation of goods produced by State corporations but in the hands of individuals at the time of shipment; after which its effect as applied to the corporations involved, and with reference to the sovereignty of the States, will be discussed.

The right to trade, it appears, is a right or privilege possessed by all persons subject to the jurisdiction of the Federal Government. The character of the right is not altered by the fact that the trade is carried on between several States, instead of entirely within the limits of one State. The Constitution did not grant the right to engage in interstate commerce, but merely placed the regulation of it in the hands of Congress. In *Gibbons* v. *Ogden*, Chief Justice Marshall said: "In pursuing the inquiry at the bar, it has been said, that the Constitution does not confer the right of intercourse between State

[1] *Trade-Mark Cases* (1879), 100 U. S. 82; *Employers' Liability Cases* (1908), 207 U. S. 463.

and State. That right derives its source from those laws whose authority is recognized by civilized man throughout the world. That is true. The Constitution found it an existing right, and gave to Congress the power to regulate it."[1] And in *Crutcher* v. *Kentucky*, the court, in speaking through Mr. Justice Bradley, said: "To carry on interstate commerce is not a franchise or privilege granted by the State. It is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States."[2]

The right to dispose of one's property by interstate sales is both a right of liberty and of property within the meaning of those words in the amendment. "The liberty mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."[3] That the right is also one of property seems unquestionable.

But, as mentioned, all rights of liberty and property are held subject to the reasonable exercise of the powers of government for the public benefit. The prohibition in question, however, is not an exercise of the police power of Congress over commerce, nor of the taxing

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[1] (1824), 9 Wheat. 1, 211. See also *Crowley* v. *Christensen* (1890), 137 U. S. 86, 89.

[2] (1891), 141 U. S. 47, 57.

[3] *Allgeyer* v. *Louisiana* (1897), 165 U. S. 578, 589.

power, nor that of eminent domain. It is a regulation of commerce, but the question remains whether or not it is an arbitrary exercise of that power, and therefore a deprivation without due process of the liberty and property right to sell articles in interstate commerce.

When an act is clearly a legitimate exercise of a power conferred upon Congress, it is settled that the court will not inquire into the motives which prompted the legislation.[1] But when a law on its face appears arbitrary, there must be some valid reason justifying it, or it will be violative of due process. Any act which deprives a citizen of a vested right is arbitrary, it is believed, unless it is shown that it was passed for the furtherance of some public policy. For example, the act prohibiting the transportation of lottery tickets in interstate commerce was justified upon the ground that it was for the protection of the morals of the public.

The prohibition which we are discussing is arbitrary on its face. It deprives the individual of his vested right to trade between the States, in so far as he is possessed of goods which have been originally manufactured or produced by a State corporation, whereas goods of exactly the same character and quality, but not the product of such corporations, may have a free passage. And it is believed that no sound reason can be found which justifies such action. The ultimate purpose, — to compel all corporations which may engage in interstate commerce to become chartered by the Federal Government,— may be the wisest method of regulating that commerce, but the means employed to accomplish it seem wholly arbitrary and unjust.

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[1] *Veazie Bank* v. *Fenno* (1869), 8 Wall. 533; *McCray* v. *United States* (1904), 195 U. S. 27.

Furthermore, the operation of the statute upon the corporations affected illustrates its arbitrary character. It affects not only the State corporations which may be engaged in interstate commerce, but manufacturing and other corporations which may never carry on an interstate business, but sell entirely to local dealers, who are themselves engaged in interstate transactions. As a result of the stigma placed upon their productions, those commodities would be practically unmarketable within the State except to the few dealers whose business was confined wholly within the limits of the State. It would therefore amount to an interference with the right of the corporation to contract within the jurisdiction which created it; all producing corporations would be practically compelled to obtain a federal charter even though not themselves engaged in interstate commerce. Production within the State is entirely without the jurisdiction of Congress. State corporations engaged only in production could not be compelled directly by Congress to become chartered by the Federal Government. Congress would therefore be exercising its power over commerce to obtain control of a business which is entirely outside of its jurisdiction. That such legislation would be unconstitutional seems apparent from the decision in the *Employers' Liability Cases*,[1] in which an act of Congress regulating the relation of master and servant, so far as interstate carriers were concerned, was held unconstitutional, because by its terms it was not limited to the interstate business of the carriers. It was argued that one who engaged in interstate commerce thereby subjected all of his business concerns to the regulating power of Congress, but the court, speaking through Mr. Justice White, denied this: "To state the proposition is

[1] (1908), 207 U. S. 463.

to refute it. It assumes that because one engages in interstate commerce he thereby endows Congress with power not delegated to it by the Constitution; in other words, with the right to legislate concerning matters of purely State concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the condition would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the State as to all conceivable matters which from the beginning have been, and must continue to be, under their control so long as the Constitution endures." In the legislation under discussion, Congress would be denying the right to transport goods in interstate commerce, except upon the condition that those goods have not been produced by certain bodies,—a condition which would otherwise be clearly beyond the power of Congress.

In addition, it may be fairly contended that the act would be so arbitrary as to amount to an invasion of the sovereignty of the States. A State unquestionably has the power to incorporate companies and grant to them the absolute right to engage in production and sale entirely within the limits of the State. Congress, however, by singling out all such corporations and closing the channels of interstate commerce to their products, in whosesoever hands they might come, would so impair the ability of the corporation to market its products within the State as practically to declare to

the State government that it should not do what it had the complete power to do.

Upon the whole, therefore, we are led to the conclusion that the prohibition in question would be so arbitrary an exercise of the power as to be inconsistent with that due process required by the Fifth Amendment.

There is a further argument by which, if it is sound, the same conclusion is reached. If by the act in question an unreasonable classification is adopted, would not this in itself be a denial of due process? In other words, does due process require that the laws shall operate equally upon all who are similarly circumstanced?

Upon this point there are no direct decisions. The necessity for an answer to such a question could never arise under the Fourteenth Amendment, because that amendment contains a clause which prohibits a State from denying to any person within its jurisdiction the equal protection of the laws. This fact, indeed, furnishes a strong argument against the contention, because if the necessity for equal laws is a part of due process, the clause of the Fourteenth Amendment mentioned is mere redundancy. And we have concluded that there is little doubt but that the clause in the Fifth Amendment would be construed the same as the similar clause in the later amendment has been.

But, on the other hand, one of the most fundamental conceptions of our government would seem to be the idea of equality before the law. If any measure can be said to be arbitrary, it is that which singles out an individual and subjects him to duties or burdens from which his fellow-citizens in similar circumstances are exempt. The right to the equal protection of the laws would seem to be one of those inherent rights, such as

the right to notice and a hearing, a deprivation of which is in itself arbitrary and unjust, and in violation of due process.

This idea is clearly recognized in many of the definitions of due process. It appeared in the oft-quoted definition of Mr. Webster, "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial." In a definition which has been cited, the Supreme Court said, "Due process of law within the meaning of the Fourteenth Amendment is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government."

In the recent case of *District of Columbia* v. *Brooke*,[1] the question was raised, but not decided. Congress, in legislating with reference to the drainage system in the District of Columbia, discriminated between resident owners and non-resident owners of property. The court intimated a doubt whether Congress was prohibited from enacting laws which discriminated between persons or things, but held that, however that might be, the prohibition could not be stricter or more extensive than that imposed upon the States by the Fourteenth Amendment. Since the clause of the amendment prohibiting a denial of the equal protection of the laws did not take from the States the power of classification, the same power could not be denied to Congress. And the classification between resident and non-resident property owners adopted by Congress in the statute in question was regarded as entirely reasonable.

But, while it must be admitted that the question is still open, it is believed that the better and sounder

[1] (1909), 214 U. S. 138.

view is that an act of Congress which unreasonably discriminates against a class, or which adopts an arbitrary and unreasonable classification, is inconsistent with due process, and therefore unconstitutional.

In the statute under discussion there is a classification of things and of persons. Articles which may be shipped in interstate commerce are divided into two classes, those which were manufactured or otherwise produced by State corporations, and those which were not. Producers are also divided into two classes, those who are incorporated by a State, and those who are not.

1. *Classification with reference to things.* In determining what is or is not an equal operation of the laws, the Supreme Court would probably be governed by the decisions upon that question under the clause of the Fourteenth Amendment, which prohibits a denial of the equal protection of the laws by a State.

From the case of *Coxe* v. *Texas*,[1] decided under that clause, it appears that a classification or discrimination as to things is not a denial of the equal protection of the laws, where the facts are such that there is not a definite class of persons selling the article discriminated against, and an entirely distinct class selling the articles not discriminated against. In that case, the State of Texas passed a statute which required dealers in liquor to procure a license and give a bond. By the provisions of the statute, it did not apply to the sale of wine produced from grapes grown in the State while in the hands of the producers or manufacturers thereof. It was contended that this amounted to a denial of the equal protection of the laws, but the court, in reply, said that there was no natural distinction of classes among liquor sellers, — one class selling their own domestic

[1] (1906), 202 U. S. 446.

wines, another selling all intoxicants except domestic wines and therefore there was no arbitrary prohibition to one class what a similar class was permitted to do.

A similar decision was made under the Fifth Amendment in the case of the *United States* v. *Delaware and Hudson Railway Co.*[1] The commodities clause of the Hepburn Act prohibited carriers from transporting in interstate commerce articles or commodities in which the carrier had an interest, direct or indirect. Timber and the manufactured products thereof were excepted from the operation of the statute. In holding that this exception did not render the act unconstitutional the court said, "Deciding, as we do, that the clause, as construed, was a lawful exercise by Congress of the power to regulate commerce, we know of no constitutional limitation requiring that such a regulation when adopted should be applied to all commodities alike. It follows that even if we gave heed to the many reasons of expedience which have been suggested in argument against the exception and the injustice and favoritism which it is asserted will be operated thereby, that fact can have no weight in passing upon the question of power. And the same reasons also dispose of the contention that the clause is void as a discrimination between carriers."

On its facts this case appears to be analogous to *Cox* v. *Texas*. There was no one class of carriers transporting timber and the manufactured products thereof only, and a distinct class transporting all commodities except timber. Accordingly there was no denial of the equal protection of the laws.

So far as the classification as to things is concerned, these cases would appear to govern the prohibition

[1] (1909), 213 U. S. 366.

under discussion. There is no particular class of shippers who deal only in goods manufactured by State corporations as opposed to another class of shippers who deal in all other goods. Therefore the argument that there is an unreasonable discrimination between goods would not render the statute violative of due process.

2. *Classification with reference to persons.* But the contention that there is an arbitrary discrimination between producers is of much greater weight. While it is true that the right to an equal operation of the laws does not take away the power of Congress to classify, the classification must be upon a reasonable basis. Arbitrary selection, the Supreme Court has said, can never be justified by calling it classification.

Here the discrimination is against State corporations in favor of federal corporations and individuals. Is this classification justifiable? "In all cases it must appear, not only that a classification has been made, but also that it is one based upon a reasonable ground — some difference which bears a just and proper relation to the attempted classification — and is not mere arbitrary selection."[1]

It must be remembered that this is not the direct question of depriving State corporations of the right to engage in interstate commerce, in which case a classification between federal corporations on the one hand and State corporations on the other might well be reasonable, but it is a classification of producers, which selects one part of the group, State corporations, and provides that their productions shall never be transported in interstate commerce, no matter in whose hands they shall come. The classification is employed with reference to a group engaged in a business over which Congress has no

[1] *Gulf, etc., Railroad* v. *Ellis* (1897), 165 U. S. 150, 165.

control. Unless there is some reasonable ground for this discrimination, the statute is a denial of the equal protection of the laws.

What difference can there be in the method of production employed by State corporations as opposed to that employed by federal corporations or by individuals, which justifies placing the former in a separate class and legislating with reference to their productions only? There is certainly no inherent difference in the quality of the goods. A State statute regulating the rates of stock yards, which applied only to those transacting a certain amount of business, was held to be a denial of the equal protection of the laws, and yet that would appear to be based upon more reasonable grounds than the one under consideration.[1] And an anti-trust act of a State which excepted from its provisions farmers and stock raisers was also held unconstitutional for the same reason.[2] An excellent example of an arbitrary classification appears in the case of *Gulf, etc., R. R.* v. *Ellis*,[3] in which a statute was held unconstitutional which required each railroad to pay the attorney's fees of successful litigants against the railroad. The fact that the statute applied only to railroads deprived them of the equal protection of the laws. A proper basis for an attempted classification, said the court, "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

The classification which we are discussing does not appear to be reasonable within the principle quoted.

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[1] *Cotting* v. *Stock Yards Co.* (1901), 183 U. S. 79.

[2] *Connolly* v. *Union Sewer Pipe Co.* (1902), 184 U. S. 540.

[3] (1897), 165 U. S. 150.

There is no such material difference which can justify a separate classification, with reference to the production of goods, between individuals who have been granted corporate privileges by a State and those who have not, or between those who have been granted corporate privileges by a State and those who have been granted the same privileges by the Federal Government. Could it be said that the classification would be reasonable if it discriminated between foreign and domestic State corporations doing business in the same State, and excluded from interstate commerce the products of one class and not of the other? This would clearly appear to be arbitrary, and yet no difference can be perceived so far as production is concerned between a foreign State corporation and a federal corporation.

Nor is the case of *United States* v. *D. & H. R.R. Co.*[1] an authority against this view. The commodities clause of the Hepburn Act applied only to railroads and not to other carriers, and it was held that this fact did not impair the constitutionality of the act. But in view of the importance of railroads and of the great public interest in the reasonable prosecution of their business, it cannot be said that the legislation regulating the manner in which the business is carried on is unequal and unjust because it does not apply also to other carriers whose business is of a different nature and of less importance to the public. Unquestionably, a State statute which provides for the regulation of the rates of railroads, and not of other carriers, does not amount to a denial of the equal protection of the laws; and in view of the purpose to be accomplished, the Supreme Court could not say that the classification in the commodities clause was not also reasonable.

[1] (1909), 213 U. S. 366.

Accordingly, if "due process" requires that the laws shall operate on all alike, the classification which would be adopted by Congress in a statute excluding from interstate commerce the products of State corporations would be a further reason for holding the statute unconstitutional.

Second Method: Direct Exclusion of State Corporations from Interstate Commerce.

In discussing this problem we are confronted with the question of the power of Congress to prohibit, not the articles of commerce, but the use of special privileges granted by a State to individuals to be employed in transporting or shipping such articles.

The general rule is that a corporation has no life beyond the limits of the jurisdiction which created it. A charter is merely the grant to individuals of certain peculiar privileges, and those privileges cannot be exercised as of right except within the boundaries of the sovereign power which has created them.[1] Each State, therefore, has the right to determine upon what conditions, if at all, foreign corporations shall be recognized within its jurisdiction. But an exception to this rule has been made in the case of corporations which are engaged in interstate commerce. For the purpose of transacting interstate commerce, corporations have the absolute right to enter other States.[2]

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[1] *Bank of Augusta* v. *Earle* (1839), 13 Pet. 519; *Paul* v. *Virginia* (1868), 8 Wall. 168 *Hooper* v. *California* (1895), 155 U. S. 648; *New York* v. *Roberts* (1898), 171 U. S. 658.

[2] *Pensacola Tel. Co.* v. *Western Union Tel. Co.* (1877), 96 U. S. 1; *Norfolk, etc., R.R.* v. *Pennsylvania* (1890), 136 U. S. 114; *Crutcher* v. *Kentucky* (1891), 141 U. S. 47.

What is the reason underlying this exception? The power to exclude foreign corporations, or to control the exercise of their corporate privileges within the jurisdiction, is a matter which is clearly within the reserved powers of the State, just as is the exercise of the police power. What is the objection to legislation by a State which prohibits a foreign corporation engaged in interstate commerce from exercising its corporate privileges within the State in that business? In enacting such legislation the State would be exercising one of its reserved powers, and would no more be regulating interstate commerce than in the case of a law which prohibits the sale of an article which is injurious to the health of the public, as applied to articles brought from another State, such as diseased cattle, for example. Both cases would appear to be governed by the same principles. In each the law is passed by the State in the exercise of one of its reserved powers, and in the operation of each law interstate commerce is incidentally affected. The question then arises, how far may the statute affect interstate commerce and be valid. Under the "doctrine of silence" the validity of police regulations is determined by the extent to which interstate trade is affected. If it is in a matter which requires one uniform plan of regulation, the silence of Congress expresses its will that the commerce shall be entirely free from State laws, and the police regulation is invalid; but if it is a matter of local concern, the silence of Congress is interpreted as expressing its will that the States may act until Congress itself has legislated upon the subject.[1]

[1] For a more extended discussion of the validity of State statutes passed under the reserved powers which in their operation affect interstate commerce, see *post*, Chapter V.

These same principles apparently must govern the power of a State to control the exercise of corporate privileges by foreign corporations engaged in interstate commerce. Applying them, in view of the large amount of interstate business carried on by corporations, it is clear that State laws which prohibited their entrance within the jurisdiction, or which imposed conditions upon such entrance, would affect interstate commerce in a matter of national concern, in which, if there is to be legislation, one uniform system is required. Therefore, in the silence of Congress, State corporations must be allowed to pursue interstate trade without interference by any foreign State.

But no reason is perceived why Congress could not break its silence, and say that all State corporations engaged in interstate commerce should, upon entering a foreign State, be subject to laws passed by that State in the exercise of its reserved powers. Under the Wilson Act it was held that Congress could subject a legitimate article of commerce to the operation of the police regulations of the State, even though, as a result, the right to sell in the original package was destroyed.[1] Similarly, why could not the exercise of corporate privileges in interstate commerce be made dependent upon the laws of the States in which it might desire to exercise those privileges? Such action by Congress would not be a delegation of its power to regulate commerce, because, as mentioned, the State would not be regulating interstate commerce, but would be acting within one of its reserved powers.

But such legislation is by no means advocated. Instead of clearing up any confusion which now exists and placing interstate commerce on a firm basis, it

[1] *In re Rahrer* (1891), 140 U. S. 545.

would subject all interstate commerce corporations in their entire operations to the corporate policy of each State, and vastly increase the present confusion. The illustration of what seems entirely possible was cited to indicate the reason for the non-interference by the States with corporations which carry on interstate commerce.

In other words, to engage in interstate commerce is not a vested right of a corporate body. It is undoubtedly true that a corporation is a person within the meaning of the Fifth Amendment, so that it cannot constitutionally be deprived of its liberty or property rights without due process of law.[1] But although it is both a liberty and a property right of an individual to pursue a lawful occupation such as interstate commerce, this is not the case with regard to the exercise of special privileges granted by a State to individuals. The absolute right to exercise those privileges can be claimed only in the jurisdiction which has conferred them, and if their exercise beyond the jurisdiction in interstate commerce cannot be interfered with, it must be because Congress has not legislated upon the subject. In *Crutcher* v. *Kentucky*,[2] a law of Kentucky was held unconstitutional which required agents of express companies not chartered by that State to take out a license, and to file a statement showing the financial condition of the company, and that it was possessed of an actual capital equal to at least $150,000. "To carry on interstate commerce," the court said, "is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the

[1] *Paul* v. *Virginia* (1868), 8 Wall. 168; *Santa Clara County* v. *Railroad* (1886), 118 U. S. 394; *Smyth* v. *Ames* (1898), 169 U. S. 466.

[2] (1891), 141 U. S. 47.

Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulations on the subject."

This is a clear recognition of the power of Congress to exclude corporations from interstate commerce. And no sound reason is perceived why this should not be the case. Prior to the Constitution, each State had the power to exclude the corporations of other States, even though the corporations were engaged in interstate commerce. The grant to Congress of the complete power to regulate has taken away this absolute right of the States, and it must have conferred the same power in the national legislature, because there is no part of the Constitution which expressly destroys it.

A corporation not engaged in interstate trade can do business in a foreign State only with the consent of that State. When a corporation engages in interstate commerce it enters the jurisdiction of Congress, and can carry on that business only with the consent of Congress. The power to exclude would appear to be as absolute as is the power of the State in the first instance. To hold otherwise would mean that, no matter how objectionable the corporate policies of a State, Congress would be unable to prevent the exercise in interstate commerce of corporate privileges granted by that State. Considered alone, overcapitalization, lack of publicity, and other matters relating to the internal management of a corporation, are exclusively within the jurisdiction of the States, but when a corporation engages in interstate commerce, all of these matters may be investigated and regulated by Congress in so far as it is sought to employ them in the conduct of that business. If Congress has

not the power to deny the right to exercise in interstate commerce the special privileges for the transaction of business which a State has granted, its power over that commerce is by no means plenary, as has frequently been asserted by the Supreme Court. The Federal Government does not grant to individuals the right to engage in trade among the several States, because that right existed before the Constitution was adopted, but it does grant, expressly or impliedly, the right to exercise therein special privileges granted to individuals by a State.

The question may be approached from a different standpoint. Has not Congress, under its power to regulate interstate commerce, the right to establish the substantive rules of law pertaining to the commercial transactions? If so, what objection can there be to a statute which provides that the stockholders of each State corporation which engages in interstate commerce shall be unlimitedly liable for all obligations of the corporation incurred in that business?

It is unquestionable that the power of Congress over interstate commerce includes the power to regulate the instrumentalities which are employed in that commerce.[1] In the case of *Northern Securities Co.* v. *United States*[2] it was said: "No State can, by merely creating a corporation, or in any other mode, project its authority into other States, and across the continent, so as to prevent Congress from exerting the power it possesses under the Constitution over interstate and international commerce, or so as to exempt its corporation engaged in interstate commerce from obedience to any rule lawfully established by Congress for such commerce." And in a

[1] *Interstate Commerce Commission* v. *Illinois Cent. R.R.* (1910) 215 U. S. 452. The authorities upon this point are numerous.

[2] (1904), 193 U. S. 197, 345.

subsequent case the court declared that franchises granted to corporations by a State, "so far as they involve questions of interstate commerce, must be exercised in subordination to the power of Congress to regulate such commerce, and in respect to this the General Government may assert a sovereign authority to ascertain whether such franchises have been exercised in a lawful manner, with a due regard to its own laws. . . . The powers of the General Government in this particular in the vindication of its own laws are the same as if the corporation had been created by an act of Congress."[1]

There is no doubt, then, that corporations created by a State to engage in interstate commerce are subject to all lawful regulations of commerce enacted by Congress, even although privileges granted by the State are thereby infringed or destroyed. If there is a conflict, the power of the State must yield to the supreme authority of Congress. The only requirement is that the act of Congress must have some real or substantial relation to the commerce regulated.[2] With this as a test, can it be said that a law which prescribes unlimited liability as to all interstate commercial transactions, — which places stockholders in State corporations upon the same basis as individuals so far as interstate commerce is concerned, — bears no reasonable relation to interstate commerce?

In the *Employers' Liability Cases*[3] it was held that, under the power to regulate commerce, Congress could regulate the relation of master and servant with reference to the interstate business transacted by carriers. Under the statute in question the common law doctrine of fellow-servants was abolished, contributory negligence

[1] *Hale* v. *Henkle* (1906), 201 U. S. 43, 75.

[2] *Adair* v. *United States* (1908), 208 U. S. 161.

[3] (1908) 207, U. S. 463.

was made a bar only in proportion to the amount of negligence, and it was provided that no contract of relief or indemnity entered into by the employee should constitute a bar or defense to any action brought by the employee for personal injuries. In delivering the opinion of the court Mr. Justice White expressly declared: "We may not test the power of Congress to regulate commerce solely by abstractly considering the particular subject to which a regulation relates, irrespective of whether the regulation in question is one of interstate commerce. On the contrary, the test of power is not merely the matter regulated, but whether the regulation is directly one of interstate commerce, or is embraced within the grant conferred on Congress to use all lawful means necessary and appropriate to the execution of the power to regulate commerce." Surely the requirement of unlimited liability in the transaction of interstate commerce bears as reasonable a relation to that commerce as the regulation of the liability of a carrier to its employees.

As has been mentioned, interstate commerce comprises, not only the actual transportation of goods across State lines, but also contracts which in their performance necessarily involve such transportation.[1] Since the contracts themselves are commercial transactions subject to the regulating power of Congress, the prescription of rights and liabilities arising out of them, and the time within which such rights shall be enforced, are as much within the power of Congress as it is within the power of a State to enact similar laws for contracts made in the pursuance of that commerce which does not cross State lines. And unquestionably a State could provide that foreign corporations not engaged in

[1] *Supra*, page 14. See also, Chapter VIII.

interstate commerce could carry on a local business within the State only upon the condition that the stockholders should be unlimitedly liable upon all contracts in that business.

The majority of these subjects up to the present time have been governed by the laws of the individual States, but this is only because Congress has not seen fit to legislate directly upon them, and in the absence of such legislation they have been regarded as matters which should properly be determined by the local law. This seems to be clearly recognized by the few decisions bearing upon the subject.

In *Chicago, etc., Ry.* v. *Solan*,[1] a shipment of stock from Iowa to Illinois was made under a contract limiting the liability of the carrier for its negligence. Through the negligence of the carrier in Iowa, damage resulted, and suit was brought in the courts of that State. By the law of Iowa, contracts limiting liability for negligence were prohibited. It was argued that the application of this law to the contract in question would amount to an interference with interstate commerce, but the court refused to adopt this contention. "The rules prescribed for the construction of railroads," it was declared, "and for their operation and management, designed to protect persons and property, otherwise endangered by their use, are strictly within the scope of the local law. They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the State to regulate the relative rights and

[1] (1898), 169 U. S. 133.

duties of all persons and corporations within its limits." [1]

A similar decision was made in *Pennsylvania R.R.* v. *Hughes*.[2] A horse shipped from New York to Philadelphia was valued at a certain sum, and, in consideration of reduced tariff rates, the liability of the railroad for injury resulting from its negligence was limited by the contract to the said valuation. The horse was injured in Pennsylvania, and suit brought in that State, the public policy of which denied the right of the carrier to limit its liability for negligence. Damages largely in excess of the agreed valuation were recovered by the owner of the horse. The Federal Supreme Court held that in the absence of legislation by Congress the law of Pennsylvania was properly applied. The contention was made that Congress, by the Interstate Commerce Act, had legislated upon the subject. To this the court replied: "It may be assumed that under the broad power conferred upon Congress over interstate commerce, as defined in repeated decisions of the court, it would be lawful for that body to make provision as to contracts for interstate carriage, permitting the carrier to limit its liability to a particular sum in consideration of lower freight rates for transportation. But upon examination of the terms of the law relied upon, we fail to find any such provision therein."

In *Martin* v. *Pittsburg, etc., R.R. Co.*[3] it was held that a statute of Pennsylvania which provided that persons not passengers, employed in or about a railroad, should, in case of injury or loss of life, have only the same right

[1] To the same effect, see *Western Union Telegraph Co.* v. *Milling Co.* (1910), 218 U. S. 406.

[2] (1903), 191 U. S. 477.

[3] (1906), 203 U. S. 284.

of recovery as employees of the road, was, in the absence of legislation by Congress, applicable to a postal clerk on an interstate voyage, who was injured in Pennsylvania, while on the train.

The necessary implication from these cases is that Congress may, if it chooses, legislate affirmatively in respect to the right of a carrier to limit his liability in transactions of interstate commerce. That such is the case was held directly in *Atlantic Coast Line* v. *Riverside Mills*.[1] By the Carmack Amendment to the Interstate Commerce Act[2] Congress provided that any carrier receiving shipments in interstate commerce should be liable for any loss or damage to such shipments caused by it or any connecting carrier to whom the goods might be delivered; and that no contract should exempt the carrier from such liability. After the passage of this Act, goods were delivered to the Atlantic Coast Line Railroad for transportation to points in other States, under a contract which limited the liability of the Railroad to loss or damage occurring on its road. The goods were safely delivered by the Coast Line to connecting carriers, and were lost while in the care of such carriers. The shipper brought action against the Coast Line to recover the value of the goods. The Supreme Court unanimously held that the Carmack Amendment was a valid regulation of interstate commerce. and that the Coast Line was therefore liable for the loss.

Would it be any the less a regulation of interstate commerce to provide that any one engaging in interstate commerce without a federal charter should be unlimitedly liable upon all obligations contracted in the course of that business? To state the question in a different form,

[1] (1911), 219 U. S. 186.

[2] January 29, 1906, c. 3591, 34 Stat. 584, 595.

can a State grant to a group of individuals the right to have limited liability with reference to contracts and undertakings over which the State has no control?

The fact that this regulation providing for unlimited liability would be made applicable only to State and not to federal corporations appears to establish an entirely reasonable classification. The right to incorporate directly would be within the power of Congress, and in doing so the liability of the stockholders of these federal corporations would of course be prescribed. Then, by the legislation under discussion, Congress would be determining the liability of those who did not choose to avail themselves of the prior regulation. Therefore, even though due process be held to prevent a denial of the equal protection of the laws, the court could not say that the classification was unreasonable and arbitrary.

For the purposes of legislation which excludes a State corporation from interstate commerce, it is immaterial upon what theory a corporation is regarded. If treated as an entity, a fictitious person created by a State, that artificial personality can have no life beyond the jurisdiction of the State which brought it into being except with the consent of the sovereign power whose jurisdiction is invaded. The State cannot grant to the entity the absolute right to engage in interstate commerce, because it is beyond the power of the State to make such a grant. Congress has exclusive jurisdiction over interstate commerce, and therefore has the power to refuse to recognize the fictitious person created by the State.

If the aggregate theory be adopted, viewing the corporation as a group of individuals to whom the State has granted peculiar privileges for the purpose of carrying on business, the result is the same. The privileges conferred by the State can have no extraterritorial effect, but can be exercised as of right only within the limits of

the State which has granted them. It is within the power of Congress to allow or refuse to allow the extension of such privileges to the business which is under the exclusive control of that body.

Third Method: Taxation of Interstate Commerce Transacted by State Corporations.

A third method which has been suggested to enable Congress to compel all corporations engaged in interstate commerce to procure a federal charter involves the imposition of prohibitive taxes upon the interstate traffic of all State corporations. The constitutionality of such legislation resolves itself into the determination of two general questions:

1. Has Congress under the Constitution the power to tax interstate commerce?

2. If this be answered in the affirmative, does a tax upon the interstate commerce business of State corporations conform to the limitations placed by the Constitution upon the power of Congress to lay and collect taxes?

1. The Constitution provides: "The Congress shall have power — To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States."

The grant is made in the most general terms. It is subject only to the express exception that "no tax or duty shall be laid on articles exported from any State"; and the implied exception that State governmental agencies shall not be taxed. "It is true that the power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. . . . Thus limited, and thus only, it reaches every subject, and may be exercised at discre-

tion."[1] All property within the geographical limits of the United States, all occupations or special privileges, which do not come within the exceptions noted, are therefore within the taxation power of Congress. As illustrations of the subjects of this power may be cited the transmission and receipt of property by death, although the right thus to receive property is derived from the State;[2] the privilege of carrying on a private business in corporate form;[3] and the carrying on of a business entirely within the limits of a single State.[4]

The occupation or business of interstate commerce is within the jurisdiction of the Federal Government, and it is clearly not included within the implied exception that State governmental agencies cannot be taxed. Unless, therefore, a tax on interstate commerce would be a tax or duty on articles exported from a State within the meaning of the Constitution, no reason can be perceived which would prevent the imposition by Congress of a tax on such business.

It seems very probable that the framers of the Constitution intended the word "exports" to apply, not only to articles sent from a State to a foreign country, but also to articles sent from one State to another. As used in State constitutions and statutes at the time of the adoption of the Federal Constitution, the word included all articles transported across State lines, regardless of their destination. And apparently Chief Justice Marshall regarded articles brought into a State from another State as "imports" within the meaning of that word in the clause of the Constitution which provides that "no

[1] *License Tax Cases* (1866), 5 Wall. 462, 471.

[2] *Knowlton* v. *Moore* (1900), 178 U. S. 41.

[3] *Flint* v. *Stone Tracy Co.* (1911), 220 U. S. 108.

[4] *License Tax Cases* (1866), 5 Wall. 462.

State shall, without the consent of Congress, lay any duties or imposts upon imports or exports, except what may be absolutely necessary for executing its inspection laws."[1] Furthermore, an express decision was made to this effect by the Supreme Court in *Almy* v. *California*.[2]

But in *Woodruff* v. *Parham*,[3] it was held that a State tax on goods in the original package brought into the State from another State was not a tax on imports within the meaning of the Constitution. "It is not too much to say," declared Mr. Justice Miller, in delivering the opinion of the court, "so far as our research has extended, neither the word export, import, nor impost is to be found in the discussions on this subject, as they have come down to us from that time, in reference to any other than foreign commerce, without some special form of words to show that foreign is not meant. . . . Whether we look, then, to the terms of the clause in question, or to its relation to the other parts of that instrument, or to the history of its formation and adoption, or to the comments of the eminent men who took part in those transactions, we are forced to the conclusion that no intention existed to prohibit, by this clause, the right of one State to tax articles brought into it from another."

The doctrine of this case has never been qualified.[4] Therefore, if "imports" refers only to goods brought from a foreign country, "exports," by a necessary correlation, refers only to goods sent to a foreign country, unless

[1] *Brown* v. *Maryland* (1827), 12 Wheat. 419.

[2] (1860), 24 How. 169.

[3] (1867), 8 Wall. 123.

[4] In accord, see *Brown* v. *Houston* (1885), 114 U. S. 622; *Pittsburg, etc., Coal Co.* v. *Bates* (1895), 156 U. S. 577; *Fairbank* v. *United States* (1901), 181 U. S. 283; *American Steel Co.* v. *Speed* (1904), 192 U. S. 500.

there is some special form of words showing that foreign commerce is not meant.

The clause in question reads: "No tax or duty shall be laid on articles exported from any State." It may be argued that had it been intended to prohibit taxation on goods sent to foreign countries only, the clause would have been more general in its terms, — "No tax or duty shall be laid on articles exported"; that by specifically providing against taxation of articles exported "from any State," it was intended to include all articles sent out of a State, regardless of their destination. But the decisions clearly refute this contention,[1] and it may be regarded as established that a tax upon goods sent from one State to another would not be a tax on exports within the meaning of the Constitution. Thus, in *Dooley* v. *United States*, the court said: "It follows, and is the logical sequence of the case of *Woodruff* v. *Parham*, that the word 'export' should be given a correlative meaning, and applied only to goods exported to a foreign country. If, then, Porto Rico be no longer a foreign country under the Dingley Act . . . we find it impossible to say that goods carried from New York to Porto Rico can be considered as 'exports' from New York within the meaning of the clause in the Constitution."

Accordingly, there seems no reason to doubt that Congress has the power under the Constitution to lay a tax upon the occupation of carrying on interstate commerce.

2. Granting the power to tax, there are two clauses in the Constitution which limit the exercise of this power: "All duties, imposts, and excises shall be uniform throughout the United States"; "No capitation or other direct tax shall be laid, unless in proportion to the census or

[1] See *Turpin* v. *Burgess* (1886), 117 U. S. 504; *Dooley* v. *United States* (1901), 183 U. S. 151; *Cornell* v. *Coyne* (1904), 192 U. S. 418, 427.

enumeration hereinbefore directed to be taken." Direct taxes are subject to the rule of apportionment, indirect taxes to the rule of uniformity.

A tax upon interstate commerce would not be a direct tax. A tax levied upon persons because of their general ownership of property, real and personal, is a direct tax.[1] But a tax upon a business, privilege, employment, or vocation is indirect, and therefore not subject to the rule of apportionment. Thus in *Nichol* v. *Ames*[2] a tax upon the sale of property at exchanges was held not to be a direct tax upon the property itself, but a tax upon the facilities and the benefits which inhered in the use of an exchange. As a tax upon a privilege it was decided to be indirect. In *Knowlton* v. *Moore*,[3] a tax upon the transmission of property by inheritance was held to be indirect. A tax on sales of shares of stock in corporations is an indirect tax.[4] In this last case the court said that the words "duties, imposts, and excises" "were used comprehensively, to cover customs and excise duties imposed on importation, consumption, manufacture, and sale of certain commodities, privileges, particular business transactions, vocations, or occupations, and the like." Likewise in *Spreckels Sugar Refining Co.* v. *McClain*,[5] a tax upon the business of refining sugar, measured by the gross annual receipts from that business, was held to be an indirect tax. "Clearly the tax is not imposed upon the gross annual receipts as property, but only in respect of the carrying on or doing the business of refining sugar." Finally, in the recent case of *Flint* v. *Stone Tracy*

[1] *Pollock* v. *Loan & Trust Co.* (1895), 157 U. S. 429; *Flint* v. *Stone Tracy Co.* (1911), 220 U. S. 108.

[2] (1899), 173 U. S. 509.

[3] (1900), 178 U. S. 41.

[4] *Thomas* v. *United States* (1904), 192 U. S. 363.

[5] (1904), 192 U. S. 397.

Co.,[1] a tax upon business corporations measured by the annual net income was held to be an excise upon the privilege of carrying on business in corporate form, and therefore an indirect tax.

In view of these decisions, a tax upon the occupation of engaging in interstate commerce would clearly be an indirect tax. As such, it would be subject to the constitutional requirement of uniformity. The question, therefore, which must next be determined is whether a tax laid only on the interstate commerce transacted by State corporations would conform to this requirement.

The case of *Knowlton* v. *Moore*[2] definitely settled the meaning of "uniformity" as that word is used in the Constitution. In that case it was argued that an excise tax upon the transmission of property by inheritance was not uniform, because (1) legacies below a certain figure were exempted; (2) the rate of tax was classified according to the relationship or absence of relationship of the legatee to the deceased; (3) the rate of taxation progressed according to the amount of the legacy or share. After a careful and elaborate consideration, the Supreme Court decided that the uniformity clause did not restrict Congress to intrinsic uniformity, but merely to geographical uniformity throughout the United States. This principle was affirmed in *Flint* v. *Stone Tracy Co.*,[3] the court saying, "As we have seen, the only limitation upon the authority conferred is uniformity in laying the tax, and uniformity does not require the equal application of the tax to all persons or corporations who may come within its operation, but is limited to geographical uniformity throughout the United States."

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[1] (1911), 220 U. S. 108.

[2] (1900), 178 U. S. 41.

[3] *Supra.*

Thus the fact that the tax under discussion would be imposed only on State corporations, and not on individuals or federal corporations engaged in interstate commerce, would not violate the requirement of uniformity. So far as this limitation is concerned, Congress could adopt an arbitrary classification for taxation purposes. To make the tax uniform, it would only be necessary that it apply to all State corporations throughout the country which carry on interstate trade.

But we have concluded that the necessity for due process would prevent an arbitrary and unreasonable classification by Congress. It remains to be considered, therefore, first, whether the Fifth Amendment limits the power of Congress to lay and collect taxes; and, if so, second, whether the classification here is so arbitrary as to violate due process.

In *McCray* v. *United States*[1] it was said by Mr. Justice White, in delivering the opinion of the court: "Whilst undoubtedly both the Fifth and Tenth Amendments qualify, in so far as they are applicable, all the provisions of the Constitution, nothing in those Amendments operates to take away the grant of power to tax conferred by the Constitution upon Congress. . . . Conceding merely for the sake of argument that the due process clause of the Fifth Amendment would avoid an exertion of the taxing power which, without any basis for classification, arbitrarily taxed one article and excluded another article of the same class, such concession would be wholly inapposite to the case in hand."

The classification in that case discriminated between butter and oleomargarine artificially colored to represent butter, a tax being imposed upon the latter and not upon the former. This classification was regarded as entirely reasonable.

[1] (1904), 195 U. S. 27.

Assuming that the Fifth Amendment would prevent an arbitrary classification, it is certain, however, that the power to tax and a wide discretion in its exercise is so essential to a sovereign government that a classification which might be held arbitrary if made in the exercise of another power, may well be regarded as within the discretionary power of Congress in the case of the exercise of the taxation power.[1] In *Bell's Gap R.R.* v. *Pennsylvania*,[2] in dealing with the limitations upon the power of a State to tax, imposed by the clause of the Fourteenth Amendment, which prohibits a denial of the equal protection of the laws, the Supreme Court said:

"The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products, it may tax real estate and personal property in a different way, it may tax visible property only, and not tax securities for payment of money, it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State legislature or the people of the State in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such

[1] See *Flint* v. *Stone Tracy Co.*, *supra*, and authorities cited therein.
[2] (1890), 134 U. S. 232.

as are of an unusual character, unknown to the practice of our government, might be obnoxious to the constitutional prohibition."

The discretion of Congress under the Fifth Amendment in classifying for taxation purposes is, of course, as wide as that of a State legislature under the Fourteenth Amendment. The tax under discussion would be upon the privilege of exercising in interstate commerce corporate privileges granted by a State. It would not be imposed upon individuals engaged in interstate commerce nor upon federal corporations transacting the same business.

It is obvious that there is sufficient difference between the transaction of business with corporate privileges and the transaction of the same business as individuals, to justify the imposition of taxes upon the former and not upon the latter. The peculiar advantages which inhere in the corporate capacity afford a substantial basis for the classification.[1]

And there also appears to be a reasonable basis for the discrimination against State corporations in favor of federal corporations. The right of federal corporations to exercise corporate privileges in interstate commerce is granted directly by the Federal Government, which has exclusive jurisdiction over that commerce. State corporations, on the other hand, receive their corporate powers from the State governments, and the federal tax upon them is laid on the privilege of exercising in interstate trade these special advantages which have not been granted by Congress, and which are only exercised as a matter of comity. The classification would seem clearly to be within the wide discretion which may be exercised by Congress. A case in point is that of

[1] *Flint* v. *Stone Tracy Co., supra.*

Veazie Bank v. *Fenno*,[1] in which the tax which was sustained by the court was laid on the circulating notes of State banks only. It is true that the decision was also based upon the power of Congress over the currency, but the reasoning by which the case was sustained as an exercise of the taxing power has since been affirmed by the Supreme Court.[2]

Nor would the classification in question be in conflict with the decision in *Southern Railroad Co.* v. *Greene*.[3] In that case it was held that an additional State tax imposed on foreign corporations for the privilege of doing business in the State, domestic corporations engaged in the same business not being taxed, amounted to a denial of the equal protection of the laws, where the foreign corporation had come into the State in compliance with its laws and had paid a license tax for the privilege of carrying on business therein.

In that case the foreign corporation had been authorized to do business within the State, and had acquired valuable property therein, and there was no reasonable ground for distinguishing between it and a domestic corporation engaged in the same business. But in the present case, the State corporation would not have received the express grant from Congress of the right to exercise its franchise in interstate commerce. At present this right is exercised merely as a matter of comity, and the Federal Government could change this policy and place a charge upon the privilege, exactly as an individual State, which has hitherto allowed the corporations of other States to engage in business within the State upon

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[1] (1869) 8 Wall. 533.

[2] See *McCray* v. *United States* (1904), 195 U. S. 27, 58; *Flint* v. *Stone Tracy Co.* (1911), 220 U. S. 108, 155, 156.

[3] (1910), 216 U. S. 400.

the principles of comity, may legislate expressly and exact a license tax for the privilege, when the corporation in question is not engaged in the transaction of interstate trade.

That this tax would not be an infringement of the sovereign power of a State to grant corporate franchises sufficiently appears from the case of *Flint* v. *Stone Tracy Co.*[1] In that case it was held that the fact that corporate privileges were granted by a State did not exempt the corporation from a federal excise tax upon the exercise of such privileges in business. A federal tax upon the privilege of exercising in interstate commerce corporate privileges granted by a State would present a much stronger case, because it would not only be an excise tax upon a privilege, but also a charge for entering a business over which Congress has exclusive jurisdiction.

As a final objection to the tax it might be urged that the power to lay and collect taxes can be exercised by Congress only for the purpose of raising revenue, and not for the accomplishment of objects upon which Congress could not legislate directly. This does not mean that, as a general rule, the court will examine into the motives of Congress, but merely that when on its face a tax upon a particular object is so excessive as to make it apparent that it is prohibitive, it is not, properly speaking, a tax at all, but a regulation. Thus, in the tax under discussion, the object of Congress would be to render the interstate commerce transacted by State corporations so unprofitable that they would be compelled to procure a federal charter, and this object would be apparent on the face of the act. The argument does not deny that under certain circumstances it may be necessary for the government, for the purpose of obtaining

[1] *Supra.*

revenue, to take the greater part or all of a citizen's property under a legitimate tax.[1]

But, however sound this contention may be theoretically, and it does appear to be sound, the Supreme Court, it appears, has definitely adopted the contrary doctrine. Assuming merely for the purpose of this argument that it would not be within the power of Congress to legislate directly with the object of excluding State corporations from interstate commerce, — although the contrary would appear to be the case,[2] — the right to levy an excessive tax for the purpose of accomplishing that result is supported by direct authority.

In the case of *Veazie Bank* v. *Fenno*,[3] a tax imposed by Congress of ten per cent upon the amount of notes of State banks issued for circulation was held valid, although its plain object was not revenue, but the destruction of the subject taxed. The constitutionality of the tax was attacked for that reason, but the court said: "It is insisted, however, that the tax in the case before us is excessive, and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank, and is, therefore, beyond the constitutional power of Congress. The first answer to this is that the judicial cannot prescribe to the legislative departments of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation, or a class of

[1] See an article in 6 *Mich. Law Review*, 277, "May Congress levy money exactions, designated 'taxes,' solely for the purpose of destruction?" by Mr. J. B. Waite.

[2] *Supra*, pages 58–70.

[3] (1869) 8 Wall. 533.

corporations, it cannot, for that reason only, be pronounced contrary to the Constitution."

The tax in this case was also justified under the power of Congress over the currency, and it may, therefore, be distinguished from a case in which the object to be accomplished is itself beyond the jurisdiction of Congress, but the language quoted has been approved by the Supreme Court in subsequent cases.[1]

However this may be, the case of *McCray* v. *United States*[2] is directly in point. In it was involved the constitutionality of an act of Congress which imposed a tax of ten cents per pound upon the manufacture and sale of oleomargarine when colored to represent butter, uncolored oleomargarine being taxed one-quarter of a cent per pound. This tax made the cost of production of colored oleomargarine so high as to prohibit its sale, and accordingly it was apparent that revenue was not the result desired, but the prohibition of the production of the article, a matter upon which Congress had no power to legislate directly. The act was sustained as a valid exercise of the taxation power of Congress. In delivering the opinion of the court, Mr. Justice White said:

"The decisions of the court from the beginning lend no support whatever to the assumption that the judiciary may restrain the lawful exercise of power, on the assumption that a wrongful purpose or motive has caused the power to be exerted. . . .

"The judiciary is without authority to avoid an act of Congress exerting the taxing power, even in a case where, to the judicial mind, it seems that Congress had in putting such power in motion abused its lawful authority by levying a tax which was unwise or oppressive,

[1] See *supra*, p. 79, note 2.

[2] (1904), 195 U. S. 27.

or the result of the enforcement of which might be to indirectly affect subjects not within the power delegated to Congress."

In view of this case, any argument based upon the excessive character of a tax upon the privilege of exercising in interstate commerce corporate privileges granted by a State, or upon the motive or purpose of Congress in enacting such legislation, would appear of little avail.

And on the whole, no valid objection can be perceived to the constitutionality of such a tax. Without entering into any discussion of the merits of the various methods, the indirect method of prohibition by taxation seems much less desirable than the direct exclusion of state corporations from interstate commerce, which appears equally constitutional.

Fourth Method: Exclusion of Mail Matter of State Corporations.

If Congress, under its power to establish post-offices and post-roads, can determine arbitrarily what shall and what shall not be carried in the mails, a further indirect method of bringing about compulsory incorporation would be to deny to all State corporations engaged in interstate commerce the use of the mails.

The power of Congress over the postal system is very broad. It is vested exclusively in the Federal Government, because the exercise of a similar power by the States would be inconsistent and repugnant. "The States before the Union was formed could establish post-offices and post-roads, and in doing so could bring into play the police power in the protection of their citizens from the use of the means so provided for purposes supposed to exert a demoralizing influence upon the people. When the power to establish post-offices and post-roads was

surrendered to the Congress it was as a complete power, and the grant carried with it the right to exercise all the powers which made that power effective."[1]

Under this power it has been held that Congress can prohibit the transportation through the mails of all letters or circulars concerning lotteries.[2] "The power possessed by Congress," the court said in the first case, "embraces the regulation of the entire postal system of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be excluded."

An act prohibiting the carriage through the mails of obscene literature was passed by Congress in 1873,[3] and its constitutionality has never been questioned. By the act of 1890[4] the use of the mails was denied to any person or company engaged in conducting any lottery or device for obtaining money or property by means of false pretenses. This act was held constitutional by the Supreme Court in the case of *Public Clearing House* v. *Coyne*,[5] in which was sustained the right to deny the use of the mails to a corporation which the Postmaster-General believed was carrying on a fraudulent business. In discussing the nature of the postal system, the court said:

"It is not, however, a necessary part of the civil government in the same sense in which the protection of life, liberty, and property, the defense of the government against insurrection and foreign invasion, and the administration of public justice are; but it is a public function

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[1] *In re Rapier* (1892), 143 U. S. 110, 134.

[2] *Ex parte Jackson* (1877), 96 U. S. 727; *In re Rapier* (1892), 143 U. S. 110.

[3] Act March 3, 1873, 17 Stat. 598.

[4] Act Sept. 19, 1890, 26 Stat. 465.

[5] (1904), 194 U. S. 497.

assumed and established by Congress for the general welfare, and in most countries its expenses are paid solely by the persons making use of its facilities; and it returns, or is presumed to return, a revenue to the government, and really operates as a popular and efficient method of taxation. Indeed, this seems to have been originally the purpose of Congress. The legislative body in thus establishing a postal service may annex such conditions to it as it chooses."

The cases cited may be justified under a general police power of Congress over the postal system, without conceding the absolute power of prohibition. The police power extends, not only to the protection of the morals, but also to the protection of property. Therefore there seems no reason to doubt the power of Congress to denounce all corporations which control a monopoly, as repugnant to the property interests of the public, and refuse to such corporations the use of the mails. Legislation of this character, however, would have no application to the majority of State corporations which are engaged in interstate commerce, and would accordingly be of little value in making compulsory a general federal incorporation act.

But from the language of the court it is clear that the power of Congress over the postal system is absolute and includes the power to prohibit. And while in exerting the power, Congress must not act arbitrarily in violation of the due process clause of the Fifth Amendment, it can hardly be said, in view of the nature of the postal system, that any individual can have such a vested right to use the mails as to defeat the exercise of the discretion of Congress to determine what shall and what shall not be carried.

But each person within the jurisdiction has, it is believed, as a part of due process, the right to be subject

only to the same laws which apply to others similarly circumstanced. In *Public Clearing House* v. *Coyne*,[1] it is said: "While it may be assumed, for the purpose of this case, that Congress would have no right to extend to one the benefit of its postal service, and deny it to another person in the same class and standing in the same relation to the government, it does not follow that under its power to classify mailable matter, applying different rates to different articles, and prohibiting some altogether, it may not also class the recipients of such matter, and forbid the delivery of letters to such persons or corporations as in its judgment are making use of the mails for the purpose of fraud or deception or the dissemination among its citizens of information of a character calculated to debauch the public morality."

If we are correct in believing that due process requires the equal protection of the laws, an arbitrary selection or classification is beyond the power of Congress. A law which divides those who use the mail into two general classes, all State corporations on the one hand, and all who are not incorporated by a State on the other, does not seem based upon any reasonable difference, either in the character of the person or in the kind of mail matter sent, which will make the classification more than arbitrary selection. The constitutionality of this method, therefore, seems open to grave doubts.

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[1] (1904), 194 U. S. 497, 507.

CHAPTER V.

STATE LEGISLATION WITH REFERENCE TO STATE CORPORATIONS ENGAGED IN INTERSTATE COMMERCE.

Undoubtedly the most important problems which would arise as the result of a federal incorporation system would deal with its effect upon State action. To determine to what extent the property and operations of a federal corporation would be subject to State laws, and to comprehend fully the exact changes, if any, from the present system, it is first necessary to ascertain the extent to which State legislation at the present time may affect State corporations, foreign or domestic, which are engaged in interstate commerce.

The effect of the federal power of regulation in its limitation upon State action has naturally been the subject of much litigation, as there is scarcely a business of any magnitude which does not extend over two or more States. The first important problem before the Supreme Court was to determine the character of the federal power, — whether it was exclusive or whether the States had a concurrent jurisdiction in the absence of conflicting legislation by Congress.

It is an elementary principle that the States may exercise all powers not vested exclusively in the Federal Government by the Constitution or prohibited to the States. Hamilton, in The "Federalist," declared that under the Constitution a power would exist exclusively in the Federal Government in three cases only,—"where the Constitution in express words granted an exclusive authority to the Union; where it granted in one instance an

authority to the Union, and in another prohibited the States from exercising a like authority; and where it granted an authority to the Union to which a similar authority in the States would be absolutely and totally contradictory and repugnant." [1]

The power to regulate commerce among the several States is not granted exclusively to Congress in express words, nor are the States prohibited from exercising a like power. Therefore, if it is vested exclusively in Congress, it must be because a similar authority in the States would be "absolutely and totally contradictory and repugnant."

There are three possible ways in which the question may be decided: (1) the power of the Federal Government is concurrent with that of the States in all cases; (2) it is exclusively vested in the Federal Government in matters of national concern, and concurrently in the States in local matters; (3) it is exclusive in the Federal Government in all cases.

The first view has never been adopted by the Supreme Court, although individual judges have supported it. The third view was declared by Chief Justice Marshall, in *Gibbons* v. *Ogden*,[2] but it was not necessary to the decision, and was not followed in the decisions immediately subsequent to that case. There was a marked difference of opinion among the members of the court until the case of *Cooley* v. *Board of Port Wardens*.[3] In the opinion in that case, the court, holding that State pilot laws were not in conflict with the power of Congress to regulate interstate commerce, pronounced in favor of the second view, that whatever subjects were in their nature national or admitted of only one uniform plan of regulation, were

[1] "Federalist," No. 32.

[2] (1824), 9 Wheat. 1.

[3] (1851), 12 How. 299.

under the exclusive control of Congress; while in matters essentially local in importance, the power of Congress was concurrent with that of the States.

This view has not, perhaps, been expressly repudiated, but there seems little doubt from the language of the court in subsequent decisions that the actual rule at the present time is the one advanced by Marshall, that the power of regulation is exclusively vested in Congress in all cases.[1] This does not mean that a State law may not affect interstate commerce. A distinction must be noted between a State law which regulates interstate commerce and a law passed in the exercise of a power reserved to the State which in its operation incidentally affects that commerce to a greater or less extent. The power to tax property and privileges within the jurisdiction, to enact police regulations for the protection of the health, morals, or safety of the public, and to regulate that commerce which is confined within the limits of a single State, are among the powers reserved to the individual States. It is entirely possible that a law passed in the exercise of one of these legitimate powers may have the same effect upon interstate commerce as would a law enacted by Congress under its power to regulate that commerce, and yet the State law is not a regulation of interstate commerce. Thus Chief Justice Marshall, in *Gibbons* v. *Ogden*,[2]

[1] See *Shepard* v. *Northern Pac. Ry. Co.* (1911), 184 Fed. 765; *Western Union Telegraph Co.* v. *Kansas* (1910), 216 U. S. 1; *Galveston, etc., Railway* v. *Texas* (1908), 210 U. S. 217; *Houston, etc., Railroad* v. *Mayes* (1906), 201 U. S. 321; *Northern Securities Co.* v. *United States* (1904), 193 U. S. 197; *Lottery Case* (*Champion* v. *Ames*) (1903), 188 U. S. 321; *Chicago, etc., Railroad* v. *Solan* (1897), 169 U. S. 133; *Hennington* v. *Georgia* (1896), 163 U. S 299; *Brennan* v. *Titusville* (1893), 153 U. S. 289; *Brown* v. *Houston* (1884), 114 U. S. 622; *Hall* v. *De Cuir* (1877), 95 U. S. 485. See, also, Cooke on the Commerce Clause, sec. 55 *et seq.*

[2] (1824), 9 Wheat 1, 204.

declared, "All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical."

Many illustrations of this could be given. For example, a State law requiring all railroad engineers to procure a license by passing a certain examination was held constitutional even as applied to engineers on trains engaged in interstate commerce.[1] Undoubtedly Congress could pass a similar law as a regulation of interstate commerce; but it does not follow that the State law was passed under the power to regulate interstate commerce. On the contrary, the law was regarded as a valid exercise of the police power of the State. So, also, it seems that in all the cases in which the effect of a State regulation upon interstate commerce has been considered, the statute has been passed in the exercise, not of the power to regulate interstate commerce, but of some distinct power reserved to the State. The actual regulation of interstate commerce, it appears, is a power which exists only in Congress.

If this be true, the problem is at once presented, — how far may such laws, enacted in the reasonable exercise of a reserved power of the State, affect interstate commerce? It might have been held that any attempt to apply the law to the subjects of interstate commerce was an invasion of the authority conferred upon Congress, and therefore unconstitutional. On the other hand, it might have been decided that since the law was passed in the exercise of an admitted power, it could affect interstate commerce to any extent, provided that it did not conflict with an act of Congress regulating that commerce. The Supreme Court, however, adopted an intermediate

[1] *Smith* v. *Alabama* (1888), 124 U. S. 465.

view. By the "doctrine of silence," which has been referred to several times, first pronounced in the case of *Welton* v. *Missouri*,[1] and developed by succeeding cases, it is held that a State law which affects interstate commerce may be in conflict with the will of Congress as expressed by its silence or inaction. In matters which admit only of one uniform plan of regulation, the silence of Congress expresses its will that commerce among the States shall be entirely free from State restrictions, no matter under what power the law is passed; but in local matters, which concern only the immediate State, the State regulation may affect the subjects of interstate commerce until Congress itself legislates upon the same matter.

State regulations which in their operation incidentally bear upon interstate commerce may be divided into two general classes, taxation laws and police or other regulations. There are a large number of cases under each of these classes which involve the validity of the laws when applied to corporations engaged in interstate commerce. Those dealing with the extent of the power of State taxation will be discussed first.

I. State Taxation of Corporations Engaged in Interstate Commerce.

State regulation of corporations which carry on an interstate commerce business usually takes the form of taxation.

A corporation whose business is not interstate commerce cannot enter a foreign State against the consent

[1] (1875) 91 U. S. 275. See also, *Hall* v. *De Cuir* (1877), 95 U. S. 485; *Gloucester Ferry Co.* v. *Pennsylvania* (1885), 114 U. S. 196; *Robbins* v. *Shelby County Taxing District* (1887), 120 U. S. 489; *Leisy* v. *Harden* (1890) 135 U. S. 100; *Pittsburg, etc., Coal Co.* v. *Bates* (1895), 156 U. S. 577; *Western Union Telegraph Co.* v. *James* (1896), 162 U. S. 650.

of that State. It may be excluded arbitrarily, or permitted to enter upon certain conditions only. But this rule, as we have seen, does not apply to a corporation engaged in trade among the States. To allow the States to refuse admission to such corporations would materially burden that trade. Since, therefore, the corporation could not be excluded, the natural attempt on the part of the State has been to increase its revenues by taxation, and innumerable cases have arisen involving the question of the constitutionality of such action. Some of these decisions are apparently conflicting, and it is impossible to reconcile many of the statements in the opinions. Certain definite principles have, however, become settled: —

A. A State cannot tax the privilege of engaging in interstate commerce.

B. A State can tax property which has a situs within the jurisdiction, although it is employed in interstate commerce.

C. A State can tax the intrastate business of a corporation engaged also in interstate commerce.

D. A State can impose a charge upon an interstate commerce corporation for local governmental supervision rendered necessary by the way in which the business is carried on.

E. A State can charge for the privilege of using the public highways, although the corporation making use of them is engaged in interstate commerce.

Admitting these principles does not, however, clear up the difficulties. It is the application of the first two, and lately of the third, that has caused so much difference of opinion among the members of the Supreme Court. In view of the existing confusion it has been thought not only appropriate but necessary to examine at length the decisions under each principle.

A. A State Cannot Tax the Privilege of Engaging in Interstate Commerce.

This is the fundamental principle at the basis of the decisions. The right to engage in interstate commerce is not granted by the State, and, being subject to the exclusive jurisdiction of Congress, is not a privilege which the State may tax. To allow such taxes to be imposed would heavily burden the transaction of interstate traffic, and would practically give to the States the power to regulate.

There can be no doubt as to the correctness of many of the decisions. When a corporation or its agent is required to pay a license tax for the privilege of coming into the State to carry on an interstate business, it is apparent that the principle is violated.[1] For the same reason a tonnage tax upon freight carried in interstate commerce is unconstitutional,[2] as is a tax upon all messages, interstate and local, transmitted by a telegraph company.[3]

If it were necessary, many more illustrations could be given. From these and similar cases it appears that, for the purpose of testing the constitutionality of a tax, the only sound, simple, and definite method is to regard the tax as falling upon that subject by which its amount is measured. It is undoubtedly true that all taxes, by whatever measured, are in reality taxes upon the person or corporation by whom the tax is paid, but, for constitutional purposes, a tax which is measured, for example, by the gross receipts, — which rises and falls in amount as the gross receipts increase or decrease, — should be considered as a direct tax upon

[1] *Crutcher* v. *Kentucky* (1891), 141 U. S. 47.

[2] *State Freight Tax Case* (1872), 15 Wall. 232.

[3] *Telegraph Co.* v. *Texas* (1881), 105 U. S. 460.

the gross receipts. Thus, if there should be no gross receipts there would be no tax. "It has repeatedly been held that the constitutionality or unconstitutionality of a State tax is to be determined, not by the form or agency through which it is to be collected, but by the subject upon which the burden is laid."[1] It is believed that if this principle had been followed in all of the cases, there would have been little or none of the confusion which has resulted.

To return to the decisions, it seems that no logical distinction could be made between the effect of a tax upon freight carried in interstate commerce, and the receipts derived from the carriage of such freight, but at first such a distinction was made. In the case of *State Tax on Gross Receipts*,[2] it was held that a tax upon gross receipts was constitutional, although a large part of those receipts was derived from interstate commerce. The tax was regarded as falling upon a fund which had become the property of the company commingled with its other property within the State.

This distinction, however, was unsound, and in *Philadelphia, etc., Steamship Co.* v. *Pennsylvania*[3] it was abandoned, the court holding that a tax on the gross receipts derived from interstate commerce was a burden upon that commerce, and therefore unconstitutional.

No State has a right to tax interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on such commerce, and amounts

[1] *State Freight Tax Case* (1872), 15 Wall. 232, 272.

[2] (1872), 15 Wall. 284.

[3] (1883), 122 U. S. 326.

to a regulation of it, which belongs solely to Congress."[1]

Considerable confusion was thrown upon the subject by the decision in *Maine* v. *Grand Trunk Ry.*[2] Maine had imposed upon all corporations operating railroads "an annual excise tax for the privilege of exercising its franchises" within the State. If the railroad did not lay wholly within the State, the tax was to be upon an amount "equal to" such a proportion of the gross receipts as the mileage within the State bore to the entire mileage. The Grand Trunk Railway Company, a Canadian corporation engaged in interstate commerce, objected to the payment of the tax, upon the ground that it was an interference with interstate commerce. The tax, however, was held constitutional by a divided court. The majority opinion was based upon the ground that the privilege of exercising franchises within the State might be granted or withheld, within the discretion of the State, and might therefore be conferred upon such conditions, pecuniary or otherwise, as the State should think fit; and the reference to the gross receipts in this case was merely to determine an amount which might be fixed at an arbitrary sum. Four members of the court dissented upon the ground that the tax, while called a franchise tax, was laid in an unconstitutional manner, being in reality a tax upon the gross receipts.

The language of both the majority and dissenting opinions appear in conflict with the principle that no State can tax the privilege of engaging in interstate commerce. It is not true that a State may deny to a foreign corporation the privilege of exercising its franchises

[1] *Leloup* v. *Mobile* (1888), 127 U. S. 640, 648.

[2] (1891), 142 U. S. 217.

within the State when those franchises are employed in interstate commerce. Furthermore, the amount of the tax in question was measured by taking a proportion of the gross receipts of the company derived from all sources. If a tax upon the entire gross receipts from interstate commerce is a tax upon that commerce, and is therefore unconstitutional, it is difficult to understand how such a tax falls any the less upon interstate commerce when only a certain portion of those receipts are taxed. It can only be a matter of degree. The distinction between a tax directly upon the gross receipts and a tax upon an amount "equal to" the gross receipts appears wholly artificial and unsound.

It is probable, although it does not appear from the report, that the corporation was also engaged in intrastate commerce in Maine, and it may be that the franchise of carrying on this local business was what was meant by the court. The validity of the tax viewed in this light will be discussed in a later section.[1]

Subsequent decisions have held that *Maine* v. *Grand Trunk Railway* is sound only, if at all, upon the ground that the method of taxation was a proper measure of the value of the property of the company within Maine. In *Wisconsin, etc., Railway* v. *Powers*,[2] the Supreme Court sustained a tax upon the actual earnings within the State of an interstate railroad, the amount of the tax being ascertained by adding to the income derived from the business done entirely within the State, such proportion of the income from interstate business as the mileage within the State bore to the entire mileage. The court did not discuss the question of an interference with interstate commerce, but merely remarked that

[1] See *post*, page 139.

[2] (1903), 191 U. S. 379.

this was a tax upon the property and business computed by the same method as was employed in *Maine* v. *Grand Trunk Railway.*

Dividing the tax in this case into its component parts, it was laid (*a*) upon the earnings from business transacted wholly within the State, and (*b*) upon such proportion of the receipts from interstate commerce as the mileage within the State bore to the entire mileage. To the first part of the tax there can be no valid objection, but the proportionate tax upon the interstate receipts, under the principle that a tax falls upon that by which its amount is measured, is clearly a tax upon interstate commerce, and should have been held unconstitutional. To abandon this principle would mean, apparently, that the constitutionality of each tax is to be determined by the name it is given, — by the "shadow" and not by the "substance," — which is certainly unsound.

The final decision upon the subject is the recent case of *Galveston, etc., Railway Co.* v. *Texas.*[1] The State of Texas imposed upon all railroads lying wholly within its limits an occupation tax "equal to one per cent of the gross receipts." If the railroad lay partly within and partly without the State, the tax was to be "equal to such proportion of the one per centum of its gross receipts as the length of the portion of such line bears to the whole length of such line." The Galveston, etc., Ry. Co., a Texas corporation, lay wholly within the State, but it connected with other roads, and a large part of its gross receipts was derived from interstate commerce.

The tax was declared unconstitutional, the court (four judges dissenting) affirming the doctrine established in *Philadelphia, etc., Steamship Co.* v. *Pennsyl-*

[1] (1908), 210 U. S. 217.

vania,[1] that a tax upon the gross receipts from interstate commerce was a direct tax upon such commerce. It was argued that the case was governed by *Maine* v. *Grand Trunk Railway*, but of that case the court said: "The estimated gross receipts per mile may be said to have been made a measure of the value of the property per mile. That the effort of the State was to reach that value, and not to fasten on the receipts from transportation as such, was shown by the fact that the scheme of the statute was to fix a system. The buildings of the railroad and its lands and fixtures outside of its right of way were to be taxed locally, as other property was taxed, and this excise with the local tax were to be in lieu of all taxes. The language shows that the local tax was not expected to include the additional value gained by the property being part of a going concern. That idea came in later. The excise was an attempt to reach that additional value. The two taxes together fairly may be called a commutation tax."

In the case at bar the tax was regarded as "an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words 'equal to.'" "The distinction," declared the court, "between a tax 'equal to' one per cent of the same, seems to us nothing, except where the former phrase is the index of an actual attempt to reach the property and to let the interstate traffic and the receipts from it alone."

If in this case the lines of the railroad had extended beyond the limits of Texas, the apportionment of the gross receipts according to the mileage within the State would, it seems, have been practically the same method as that which was held constitutional in *Maine* v.

[1] *Supra.*

Grand Trunk Ry. It is not easy to understand how either tax can be said to fall any the less upon interstate commerce. The only difference which can be perceived is that the amount of interstate commerce which is taxed is greater in the one case than in the other. It does not seem satisfactory to say that in the one case the tax is an attempt to reach the value of the property, while in the other it is a burden upon the interstate business.

It therefore appears that, as a general rule, State taxation of the gross receipts derived from interstate commerce is a tax upon that commerce, and is unconstitutional. But if only a proportion of the gross receipts are taxed, and the court, looking at the whole scheme of taxation, regards the statute as an attempt to determine the value of the property of the company within the State, the tax will be held constitutional.

B. A State Can Tax Property which has a Situs within the Jurisdiction, although it is Employed in Interstate Commerce.

The fundamental principle governing the right to tax is that the object taxed must be within the jurisdiction of the taxing power. "All subjects over which the sovereign power of a State extends are objects of taxations; but those over which it does not extend are, upon the soundest principles, exempt from taxation."[1] Property of an interstate company which is situated within a State and enjoys the protection of its laws should bear its proper proportion of the burdens of government, unless to tax it would burden the interstate commerce in which it is employed, and thus

[1] *McCullough* v. *Maryland* (1819), 4 Wheat. 316, 429.

amount to an interference with the exclusive jurisdiction of the Federal Government. A tax based upon the actual value of the property, as other property in the State is valued, has no such effect, and is open to no objection.

The difficulty has been in the methods of valuation employed by the various States. The interstate business carried on by the company could not be taxed by the State, and as in many cases the amount of this business greatly exceeded the actual value of the property, systems were devised by which a portion of the business could be reached in the valuation of the property of the company within the State. The most general method is the proportionate mileage system employed in the case of transportation and telegraph companies, by which the taxable value of the property within the State is determined by assessing such proportion of the capital stock as the mileage within the State bears to the entire mileage of the company.

The arguments in favor of this scheme of taxation are very forcible. The rule of property taxation undoubtedly is that the value of the property is the basis of taxation. But the true value of a railroad or telegraph company, it is said, is something more than an aggregation of the value of individual parts of it operated separately. Each part is enhanced in value because of its use in connection with the rest of the system, and each part, therefore, for taxation purposes may be treated as part of an organic whole, and its value determined accordingly. "The value of property results from the use to which it is put, and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from that use. The amount and profitable character of such use determines the value, and if property is

taxed at its actual cash value it is taxed upon something which is created by the uses to which it is put."[1]

The entire value of the property of every kind of a railroad or telegraph company, it is argued, is evidenced by the actual value of its capital stock, and when such a proportion of that value is taken, as the mileage within the taxing State bears to the entire mileage of the system, a fair valuation of the property within the State is reached. It is admitted that the rule could not be applied under certain circumstances, as, for example, where the corporation had a terminal of immense value outside of the taxing State. But as a general rule, it is contended, the result is just, both to the State and to the corporation.

In spite of the force of these arguments, it is submitted that the rule is unsound in principle. That it is unsatisfactory in application is evidenced by the numerous dissenting opinions in the decisions sustaining the application of the rule. A tax measured upon the actual value of the capital stock of a corporation — which changes in amount as the stock rises and falls on the market — is a direct tax upon the capital stock. The theory is that the capital stock represents the property in which the stock is invested. But an analysis of the elements which enter into the market value of capital stock will show that it is made up of more than tangible property. In the case of *Pullman Co.* v. *Transportation Co.*[2] one of the points involved was the valuation of property which had been leased and destroyed before the disaffirmance by the lessee of the contract, which was illegal. The lessor, a corporation, had leased its entire plant, and the circuit court decided that the

[1] *Cleveland, etc., Railroad* v. *Backus* (1894), 154 U. S. 439, 445.

[2] (1898), 171 U. S. 138.

market value of the capital stock at the time of the transference was the proper measure of the value of the property. This conclusion the Supreme Court reversed, saying:

"The market price of the shares of stock in a manufacturing corporation includes more than the mere value of the property owned by it. . . . The value of the franchise for one thing enters into the computation of market value. . . . The probable prospective capacity for earnings also enters largely into the market value, and future possible earnings again depend to a great extent upon the skill with which the affairs of the company may be managed. These considerations, while they may enhance the value of the shares on the market, yet do not in fact increase the value of the actual property itself. They are matters of opinion upon which the persons buying and selling the stock may have different views."

Thus there are three elements which enter into and determine the value of the capital stock, (*a*) the tangible property, (*b*) intangible property, including the franchise, and (*c*) the prospects of income from the business. A tax upon the actual value of the capital stock is a tax upon all three of these elements. The income, present or prospective, from the business cannot be taxed by itself, because that business is interstate commerce. Omitting for the present any discussion of the right to tax the franchise, should the prospects of income from the business be included in the value of the property, upon the theory that the value of the property depends upon the use to which it is put?

It is true that the value of property depends largely upon its capacity for use, but it is by no means true that property employed in a business is as valuable as the earnings from that business. The earnings in any busi-

ness depend to a very considerable extent upon the ability and experience of those who are conducting it. To quote from Judge Taft: "It certainly could not be said that the amount of profits of a dry goods store capitalized on a basis of six per cent would afford any proper guide to the value of the real estate, the merchandise, and the ready capital used in the business. Where the property earns the money, as real estate earns rent, or as money loaned earns interest, the earnings do determine very largely the value of the property; but where, as in a business of an individual or a corporation, the investment is active, instead of passive, there is no necessary relation between the value of the tangible property and the earnings."[1] The business of conducting a railroad or a telegraph company is unquestionably an active investment, and the profits made in the business bear no necessary relation whatever to the value of the tangible property. The use to which the property is put, so far as it is interstate commerce, is not within the jurisdiction of the taxing State, and cannot be burdened.

It is no less a tax upon such use when the tangible property is assessed above its actual value at an amount which includes the earnings from the interstate business in which the property is employed. In the case of *Delaware, etc., Railroad* v. *Pennsylvania*,[2] in which a tax upon the entire capital stock of a Pennsylvania corporation was held unconstitutional in so far as it included the value of coal which had a situs outside of the taxing State, the court said:

"If the property itself could not be specifically taxed because outside the jurisdiction of the State, how does the tax become legal by providing for assessing the tax

[1] *Western Union Tel. Co.* v. *Poe* (1894), 61 Fed. Rep. 449, 457.

[2] (1905), 198 U. S. 341.

on the value of the capital stock to the extent it represents that property and from which the stock obtains its increased value? Can the mere name of the tax alter its nature in such a case? If so, the way is found for taxing property wholly beyond the jurisdiction of the taxing power by calling it a tax on the value of the capital stock or something else, which represents that property. Such a tax, in its nature, by whatever name it may be called, is a tax upon the specific property which gives the added value to the capital stock."

So here it may be asked, — If the interstate business cannot be specifically taxed, how can the tax become legal by assessing the property at an amount which includes the prospective profits from that interstate business, which unquestionably add considerably to the market value of the capital stock?

Therefore the argument that the value of the property depends upon the value of the business seems clearly unsound. But the further question remains with reference to the franchise of the corporation. Can it be taxed, as property? If so, what is the proper measure of its value? Does its value depend upon the amount of business transacted by the corporation?

A corporate franchise is a right granted by the sovereign to carry on a particular business subject to certain peculiar rules of law. It is a property right, just as is the right of an individual to contract, or the right of individuals to associate as partners.

If an enterprise of the size and character of that carried on by corporation X could not be carried on by a partnership, then the right to carry it on with "common name," "limited liability," "transferable shares," etc., is essential. In one sense, in such a case, the franchise is worth the whole value of the capital stock less the value of the tangible property and the choses in action. The

value of the stock depends upon tangible property and prospective profits, and the prospective profits could not be acquired if the business were not continued, and the business could not be continued without the corporate franchise.

On the other hand, the profits are to be made out of the business. The business is not the franchise, any more than the right of two partners to associate is the business of the partnership. A and B are partners. The business is too large for either one to carry on separately. In one sense the value of the right to associate as partners is the difference between what the partners could make acting separately and what they could make acting in partnership. The right to associate as partners is essential. But so also the right of an individual to contract, or to hold and convey property, is essential to his business, and the value of these rights is in one sense the value of his business.

A business is a connected series of acts toward the end profit. Certain legal rights or rules of law are essential to all business, as the right to contract. Certain other rights, as the right to associate on a corporate basis, are essential to some businesses. But the mere right without the business is of no value. If the right is a special right that is not common to all men, then the State may charge those to whom it grants the right any arbitrary sum it pleases, unless some constitutional provision stands in the way. But if the amount of the tax varies with the amount of the business, the tax is on the business, and not on the right; if it varies with the amount of property in the business, it is a tax on that property, not on the right; for, by supposition, if there were no business or no property there would be no tax, and yet the right would still exist.

If the right is common to all persons, as the right

to contract, and the State should tax its exercise according to the value of the contracts, this again would be a tax on those contracts, and not on the right to contract. The State might say, if no constitutional provision stood in the way, that all men who did not pay so much a year must resign their right to contract, and this would be a tax on the right, as it would be levied on the possession of the right and not on its exercise.

The mere fact that the right is not a general right, as the right to have limited liability in a certain class of contracts, does not make it any the less a mere right. The special value of the right gives it a market value which it would not otherwise possess. The State, therefore, is able to charge for it, just as it would be able to charge for the right to make shoes, if it could withdraw that right from the people generally, and put up at auction a few licenses. But the moment it measured its charge on the amount of shoes, or the profits in the business of shoemaking, it would be a charge on the business, not on the abstract right to carry it on.

Applying the result of this analysis to the taxation of a corporate franchise, — first, by the State which granted the charter, — the value of the right to carry on business in corporate form is not the amount of business transacted, but the market value of the abstract right to do business in that way. This market value depends on two factors. Can the business be carried on by those who wish to do it, without the peculiar corporate rights, — could it be done by a partnership? If so, the market value of a franchise is little or nothing. But if practically it could not be carried on without a corporate franchise, how limited is the privilege to do it as a corporation? If the State freely grants the corporate franchise to all, it has no more market value than the right to contract. This difference, however,

exists. No matter how freely the State grants the corporate rights, theoretically each charter is a special grant, which under the power to alter, amend, and repeal, the State can take away constitutionally. Therefore, it can charge for this right where it cannot for a right which it cannot take away, such as the right to contract. And constitutionally, there may be a great deal to be said for the proposition that the State can charge any arbitrary sum it desires.

The real question of difficulty is this. It is admitted a State cannot tax interstate commerce. It is admitted that it cannot tax property outside of its jurisdiction. Suppose it is admitted that, having the right to refuse or to annul a charter to be a corporation, the State can place any arbitrary charge on the exercise of this right. If, under these circumstances, it imposes upon the corporation a tax of a certain per cent of its receipts from interstate business and calls it a charge for the continued enjoyment of the franchise to be a corporation, is the law constitutional?

To this there may be two solutions: 1. A tax falls upon that subject by which its amount is measured. This tax is measured by the amount of interstate business transacted, and is therefore a tax on that business and is unconstitutional. The State has a right to charge for the franchise, but it cannot tax interstate commerce under the pretense of taxing the franchise.

2. As the State can charge any arbitrary sum it desires for the franchise, the mere fact that reference is made to the interstate business to ascertain the amount of the tax does not make it a tax on that business.

These are the two — and apparently the only two — possible solutions when a State taxes a corporation, which it has chartered, for the privilege of continued corporate existence, and measures the tax upon the

entire capital stock or gross receipts, or a certain proportion of either. The same difficulty has arisen in other cases in which the State has the right to charge for a privilege granted by it, as in the case of a tax upon the intrastate business of a corporation which is also engaged in interstate commerce. The Supreme Court has, it would appear, proceeded sometimes on the one theory and sometimes on the other, although of late the tendency has been to adopt the first and what, it is submitted, is the better rule. To regard a tax as falling upon that by which its amount is measured furnishes an exact and practical test by which its constitutionality can be determined.

If, then, the value of the corporate franchise, taken by itself, cannot be determined by a reference to the interstate business of the corporation, no more can it be said to equal the value of the capital stock less the value of the tangible property and choses in action, in order to enable the State to tax the capital stock or a proportion of it. Such a valuation includes the profits from the business, and is a tax upon those profits.

Next, let us apply the foregoing principles to the taxation of the corporate franchise by a foreign State into which the corporation has gone for the purpose of transacting business. The business is interstate commerce, so that the State cannot exclude the corporation. Therefore, the right to carry on the business with "limited liability," "transferable shares," etc., is not a privilege granted by any State other than that which granted the charter. No additional franchise of corporate capacity is granted by the foreign State.

In some cases the franchise of a corporation is divided into the franchise "to be" and the franchise "to do," and it is said that the franchise "to do" is taken into every State in which the corporation has tangible

property, and can be taxed together with the tangible property in that State. But there seems to be no reason for any such distinction. The franchise of a corporation is the right to carry on business with the advantage of certain peculiar rules of law, and whether it is called the franchise "to be" or "to do," it is all one and the same. If the franchise of corporate capacity cannot be taxed, it is difficult to perceive upon what reasoning the franchise to transact business in corporate form can be held subject to taxation. Indeed, if there is any valid distinction, it would seem that the franchise "to do" interstate business is clearly exempt from State taxation. To repeat the quotation from *Crutcher* v. *Kentucky*:[1] "To carry on interstate commerce is not a franchise or privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on this business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject."

Since, then, the State does not grant the right to have corporate capacity, it cannot charge for the continued enjoyment of that privilege, as could the State which originally created the corporation. But this right of corporate capacity is a property right which is taken wherever the corporation transacts business, and it should be subject to State taxation in so far as it is employed within the State. The amount of such taxation, however, cannot be arbitrarily fixed by the State, but, like all property taxation, must be based upon the actual value of the property right. The sole question

[1] (1891), 141 U. S. 47, 57.

then must be, what is the market value of the franchise? This again depends upon the two factors mentioned, — the necessity of the franchise to the successful prosecution of that particular business, and the difficulty of obtaining the grant of the privilege. Under modern incorporation laws, in the great majority of the States, there is no difficulty practically in procuring a corporate franchise. As a result, the franchise itself would have little or no more market value than the right of individuals to contract.

But, however this may be, the same is true in this case as in our former discussion. A tax upon the business or the profits from the business carried on by a corporation is not a tax upon the abstract right to have corporate capacity. A tax upon a certain proportion of the capital stock is a tax upon that proportion of the tangible property of the company, the intangible property, including the franchise, and the prospective profits from the business. The tax upon the profits is a direct burden upon interstate commerce, and cannot be made any the less so by being included in what is termed a tax upon the tangible property and franchises within the State treated as part of a going concern.

In the case of railroad taxation, it may be argued that the State is taxing the privilege or right of eminent domain. This privilege need not be granted to the corporation, and the right of the State to impose a charge for such a grant is unquestioned. And if the right has been granted, its future exercise may possibly be taxed. But when the right has been exercised, when the land has been appropriated, the right ceases to exist and cannot be taxed. The land appropriated becomes part of the property of the corporation, and a tax upon the right to appropriate it is an impossibility.

A tax on the capital stock of the corporation, therefore, is not a tax upon the right of eminent domain.

To summarize, at the risk of repetition: A tax upon the capital stock, or a proportionate part of it, is a tax upon the elements which make up the value of the capital stock. These elements are the tangible and intangible property and the prospects of income from the business. The theory that the value of the property is equal to the value of the business is unsound, because the investment is active. The franchise not only cannot be said to equal the value of the capital stock less the tangible property and choses in action, but has, in itself, little or no market value. Upon neither theory, therefore, can the prospects of income from the interstate commerce business be included in the property taxed, and by strict conformance to settled principles, the tax, it is submitted, should be held unconstitutional.

Property Taxation by the Incorporating State.

In reviewing the cases, those dealing with taxation by the State which chartered the corporation will be discussed first.

One preliminary matter must be disposed of. Economically an original charge or fee for incorporation is not a tax. It is a fee charged in payment of a privilege granted by the State, and is imposed only once. It is not, as is a tax, an annual or continued charge. As a result, there seems no constitutional objection to the determination of such a fee by taking a certain per cent of the entire capital stock of the corporation, even though part of the property of the company is located outside of the incorporating State, and though its business is largely interstate commerce. It is not similar to a tax which rises and falls with the amount of

interstate business transacted, because it is charged at one time only. The principle would, of course, be the same when separate corporations consolidate into one.

This was decided in the case of *Ashley* v. *Ryan*,[1] the facts of which were as follows: Certain railroads, incorporated under the laws of several different States, one of which was Ohio, desired to consolidate into one corporation under the laws of Ohio. As a fee for incorporation, the State demanded one-tenth of one per cent of the value of the entire capital stock of the various companies. Objection was made that this amounted to a tax on property located outside of Ohio, and an interference with the interstate commerce in which the railroads in question were engaged. The Supreme Court, however, held that Ohio, in granting corporate privileges, could impose such conditions as it deemed proper. "Considering, as we do, that the payment of the charge was a condition imposed by the State of Ohio upon the taking of corporate being or the exercise of corporate franchises, the right to which depended solely on the will of that State, and hence that liability for the charge was entirely optional, we conclude that the exaction constituted no tax upon interstate commerce, or the right to carry on the same, or the instruments thereof, and that its enforcement involved no attempt on the part of the State to extend its taxing power beyond its territorial limits."

But it would seem unquestionable that a continued charge upon interstate commerce could not be imposed as a condition precedent to incorporation. To allow a State to reserve in a charter the right to tax or otherwise regulate interstate commerce would give the State the power to gain control, by its own act, of matters within the

[1] (1892), 153 U. S. 436.

exclusive jurisdiction of Congress. Upon this ground appears unsound the decision in *Railroad* v. *Maryland*,[1] which upheld a stipulation in the charter of an interstate railroad which provided that at the end of every six months one-fifth of the total amount received for the transportation of passengers should be paid to the State.

The case of the *Delaware Railroad Tax*[2] appears to be the first case in which the court discussed the proportionate mileage system from the standpoint of an interference with interstate commerce. The State of Delaware imposed upon all railroads incorporated under its laws and doing business within the State a tax of one-fourth of one per cent upon the actual cash value of the capital stock, with a provision that if part of the road lay without the State, the share of the capital stock taxed should be in proportion to the entire stock as the mileage in Delaware bore to the entire mileage. The Delaware Railroad, a corporation of Delaware, had a total mileage of about one hundred miles, with a mileage in the State of about twenty-six miles. It was argued that the tax was unconstitutional because it burdened the interstate business of the company, and also reached property outside of the jurisdiction, it being shown that the value of the property in Delaware did not bear as great a proportion to the value of the entire property as the mileage within the State bore to the entire mileage.

The court admitted that if the tax were regarded as a property tax, there might be difficulty in sustaining it, but they held that it was not a tax upon the property, but upon the corporation itself, which the State might tax as an entity existing under its laws. "The manner in which its value shall be assessed, and the rate of taxation,

[1] (1874), 21 Wall. 456.

[2] (1873), 18 Wall. 206.

however arbitrary or capricious, are mere matters of legislative discretion."

It therefore appears that the tax here was regarded as a tax imposed by the State which created the corporation as a charge for the privilege of continued corporate existence. Since the State had the power to exact an arbitrary sum, the reference to a proportionate part of the value of the capital stock did not invalidate the tax. Under this view, it would follow that the tax would have been constitutional if measured upon the entire capital stock, or upon the entire gross receipts derived from interstate commerce. Under our analysis, the tax was directly upon a proportionate part of the capital stock, and was a burden upon the elements which gave the value to that stock; and since one of these elements was the interstate business of the railroad, the tax should have been held unconstitutional.

A decision similar to that in the *Delaware Railroad Tax* was made in the case of *State Tax on Gross Receipts*.[1] The tax on the gross receipts, including receipts derived from interstate commerce, was also sustained upon the ground that it was a tax upon the franchise which the State had granted. The tax, it was said, might be proportioned either to the value of the franchise granted, or to the extent of its exercise; and the gross receipts might be a measure of proximate value.[2]

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[1] (1872), 15 Wall. 284.

[2] In *Philadelphia, etc., Steamship Co.* v. *Pennsylvania* (1883), 122 U. S. 326, in which the first part of the decision in *State Tax on Gross Receipts* was overruled, a State tax on gross receipts being held to be a tax on interstate commerce and therefore unconstitutional, the court declared that the second ground for the earlier decision could not apply to the case at bar, because by the terms of the act the tax was laid equally on foreign corporations doing business in Pennsylvania.

In the case of *Central Pacific Railroad* v *California*[1] the franchise granted by California was held to be taxable by that State together with the other property of the corporation within the State. The method of determining the value of the franchise is not clear. The State Board, in assessing together the "franchise, roadway, roadbed, rails, and rolling-stock," took into consideration the number of miles within the State, and the total mileage of the road; the value of the road within the State, and the total value, etc. The principal question involved was whether franchises granted to the company by the Federal Government were included in the assessment, and it was held that the presumption was that such franchises were not included, as the Supreme Court of California had held. It appears, therefore, that there was no fixed method of assessment, and it cannot be said that the value of the franchise was determined by a reference to the receipts from interstate commerce. There could be little objection if an arbitrary sum was fixed by the Board as the value of the continued enjoyment of the privilege granted by the State.

Up to this time there had been no definite departure from the principle of the *Delaware Railroad Tax* case, that since the value of the franchise could be determined arbitrarily by the State, the fact that it was fixed by a reference to the actual value of the capital stock did not make the tax a burden on that capital stock. But in *Henderson Bridge Co.* v. *Kentucky*[2] the court intimated that the interstate business of the corporation could not be included in the valuation of the franchise.

The Henderson Bridge Company, incorporated by Kentucky to build a bridge across the Ohio River between Kentucky and Indiana, was taxed by Kentucky upon its

[1] (1896), 162 U. S. 91.

[2] (1897), 166 U. S. 150.

property, including its franchise. Part of the property of the corporation was located in Indiana, and a franchise had also been granted to the company by that State. The value of the franchise granted by Kentucky was determined by subtracting the value of the tangible and intangible property in Indiana and the tangible property in Kentucky from the total value of the property; which was ascertained by adding to the market value of the capital stock the amount of outstanding bonds. It was held that the franchise granted by Kentucky could be included in the property subject to taxation; and that the method of determining its value was reasonable. It was objected that the tax was also upon the interstate commerce transacted by the company, but the court denied this: "Clearly the tax was not a tax on the interstate business carried on, over, or by means of the bridge, because the bridge company did not transact such business. That business was carried on by the persons and corporations which paid the bridge company tolls for the privilege of using the bridge. The fact that the tax in question was to some extent affected by the amount of tolls received, and might therefore be supposed to increase the rate of tolls, is too remote and incidental to make it a tax on the business transacted."

From this it would appear that, had the company clearly been engaged in interstate commerce, the tax would have been declared unconstitutional, because that business was included in the valuation of the franchise. Four members of the court dissented upon the ground that the company was in fact engaged in interstate commerce, and that the tax was not only a burden upon that commerce, but also reached property outside of the jurisdiction.[1]

[1] Prior to this case, in *Covington, etc., Bridge Co.* v. *Kentucky* (1894), 154 U. S. 204, it was decided that the tolls charged by a

In *Keokuk, etc., Bridge Co.* v. *Illinois*[1] it was held that a tax laid by Illinois on the entire capital stock of a bridge company which maintained an interstate bridge was a valid tax upon the franchise granted by Illinois to the corporation. The court, however, expressly pointed out that the constitutionality of the assessment upon the capital stock was not before them. The only objection to the tax brought before the court was that it was an interference with interstate commerce. Upon this point the court approved the decision in *Henderson Bridge Co.* v. *Kentucky*, holding that the company was not itself engaged in interstate commerce.

The question was more directly presented in the case of *Louisville Ferry Co.* v. *Kentucky*.[2] The ferry company, a corporation of Kentucky, maintained a ferry between Indiana and Kentucky. An additional franchise had been granted to the corporation by Indiana. Kentucky imposed a tax upon the franchise granted by it, determining the value by capitalizing the net receipts of the company at six per cent and deducting from the total the value of the tangible property in Indiana and Kentucky. No deduction was made for the value of the

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bridge company for the transportation across a bridge connecting two States could not be regulated by one State, because such tolls were receipts from interstate commerce. In view of this decision, the opinion of the minority in *Henderson Bridge Co.* v. *Kentucky* that the bridge company was itself engaged in interstate commerce appears sounder than that of the majority. But, admitting that the company was not engaged in interstate commerce, as the majority decided, the problem resolves itself into the question whether the rental received from leased property can be taxed when that property is employed in interstate commerce. Such a tax does not appear objectionable so far as an interference with interstate commerce is concerned. See pages 130–131.

[1] (1900), 175 U. S. 626.

[2] (1903), 188 U. S. 385.

franchise granted by Indiana, and for this reason the tax was declared unconstitutional. "There is, in our judgment," said the court, "no escape from the conclusion that Kentucky thus asserts its authority to tax a property right, an incorporeal hereditament, which has its situs in Indiana."

It was argued that the State could make it a condition of continued corporate existence that a tax should be measured by the value of all the property of the corporation, wherever situated. To this the court replied: "It is a sufficient answer to this suggestion to say that no such condition was prescribed in the charter of the ferry company when it was granted and accepted. Nor does the taxing statute in question make it a condition of the ferry company's continuing to exercise its corporate powers that it shall pay a tax for its property having a situs in another State. . . . We express no opinion as to the validity of such a condition if it had been inserted in the company's charter, or if it were now, in terms, prescribed by any statute." Since, under this view, the tax was unconstitutional, the court declined to express an opinion with reference to the objection that the tax was a burden upon the interstate commerce.

It is submitted that it was not necessary that the statute should in terms make the payment of the tax a condition of continued corporate existence to make it a tax upon that privilege. As a result of our analysis we have concluded that the fact that the State possessed the power to repeal a charter, and thus end the corporate existence, was the principal element which entered into the value of the franchise and gave it a market value which could be taxed. Since, therefore, this right of the State to take away the franchise is what enables it to charge for or tax the privilege after it has been granted, any tax upon a franchise granted by the taxing State

is a charge upon the right of continued corporate existence. But, assuming that the tax in the case above was upon this right, it would still be objectionable because measured upon the value of property beyond the State and also upon the profits from the interstate business.

The most recent case upon this subject is that of *Galveston, etc., Railway* v. *Texas*,[1] the facts of which have already been given, but may be repeated briefly. Texas imposed upon all railroads lying wholly within the State an occupation tax equal to one per cent of their gross receipts. The Galveston, etc., Railway, a corporation of Texas, lay wholly within the State, but connected with other roads, so that a large part of its gross receipts was derived from interstate commerce. The attorney for the State argued that the occupation tax was a tax for the privilege of the continued exercise of the franchise granted by Texas to do business in the State as a corporation. The tax was not laid directly upon the gross receipts, it was contended, such receipts being merely a measure by which the amount of the tax was determined. The majority of the court, however, held that the tax was an effort to reach the gross receipts and amounted to an attempt to regulate commerce among the States. "Of course, it does not matter that the plaintiffs in error are domestic corporations or that the tax embraces indiscriminately gross receipts from commerce within as well as outside of the State."

Chief Justice Fuller and Mr. Justices Harlan, White, and McKenna dissented, upon the ground that the corporation was a Texas corporation, "and it cannot be doubted that the State may impose an occupation tax on one of its own corporations, provided such tax does

[1] (1908), 210 U. S. 217; *supra*, page 97.

not interfere with the exercise of some power belonging to the United States." The tax in question, it was asserted, did not invade the jurisdiction of Congress, because the tax was not laid directly upon the gross receipts as such, but was upon an amount "equal to" the gross receipts. "The State only measures the occupation tax by looking at the entire amount of the business done within its limits without reference to the source from which the business comes."

Thus it appears that the entire court agreed that the State could not directly tax the gross receipts from interstate commerce upon the pretense of levying an occupation or franchise tax. The difference in opinion lay in the fact that the tax was upon an amount "equal to" the gross receipts, which the minority of the court did not consider a direct tax upon the gross receipts. The mere reference to an amount equal to the gross receipts was regarded as a reasonable method of determining the amount of the tax. Upon this point the opinion of the majority, it is believed, expresses much the sounder view. If the tax is measured upon a sum equal to the gross receipts, so that its amount rises and falls according to the amount of interstate business transacted, the effect is exactly the same as if the tax had been in terms directly laid on the gross receipts. The burden falls upon the interstate business as much in the one case as in the other.

If, therefore, as appears settled by this case, it is unconstitutional to determine the value of the franchise by a reference to the gross receipts from interstate commerce, how can a different result be reached when the constitutionality of a tax upon the capital stock in proportion to the mileage within the State is in question? The tangible property and choses in action which have a situs within the State can be taxed. The franchise,

since it was granted by the State, can be taxed. The profits, present or prospective, from interstate commerce, cannot be taxed. All three of these elements enter into the actual value of the capital stock, and a tax upon that stock is a tax upon each of them. To allow the interstate business to be taxed by appraising the value of the property and franchise at an amount which includes those profits is, it appears, to allow the State to do indirectly that which it could not do directly.

Property Taxation by a Foreign State.

Under this topic there is a long line of decisions sustaining the power of a State to tax the capital stock of an interstate corporation in such proportion as the mileage within the State bears to the entire mileage. This method, it is declared, furnishes a fair valuation of the property within the State treated as part of one system, or "going concern."

Prior to these decisions, in *Gloucester Ferry Co.* v. *Pennsylvania*,[1] a tax imposed by Pennsylvania upon the entire capital stock of the Gloucester Ferry Company was held unconstitutional. The company maintained a ferry between New Jersey and Pennsylvania, and its only property in Pennsylvania was a leasehold interest in a wharf. The reason for the decision was not only that property outside of the jurisdiction of Pennsylvania was taxed, but also that the interstate business of the company was burdened. The court declared that while the property of a corporation engaged in interstate commerce could be taxed by the State in which the property was situated, yet it could not be taxed because of its use in that commerce. The method of

[1] (1885), 114 U. S. 196.

appraising the property by taxing the entire capital stock was evidently regarded as including the interstate use to which the property was put, and the tax accordingly was invalid. It would seem to follow logically that the tax would have fallen proportionately upon the interstate use if the method of appraisement had been to assess only such proportion of the capital stock as the property in Pennsylvania bore to the entire property.

Telegraph Companies: The first modification of the rule in *Gloucester Ferry Co.* v. *Pennsylvania* appeared in the case of *Western Union Telegraph Co.* v. *Massachusetts*.[1] The telegraph company, a New York corporation, was extensively engaged in interstate commerce, its lines extending over many States. Under an act of Congress of 1866 it had the right to erect its lines over the post-roads of the United States. The length of its entire system was about 146,000 miles, and the length in Massachusetts was about 2,800 miles. The actual value of the property of the corporation in Massachusetts, as other property was valued, was comparatively little. Under these circumstances Massachusetts imposed upon the company a "franchise" tax on such proportion of the capital stock as the mileage within the State bore to the entire mileage.

It was argued that the value of the franchise granted by Congress under the act of 1866 and that granted by New York were included in the property taxed, as well as tangible property beyond the jurisdiction of Massachusetts, and that the tax was a burden upon the interstate business of the company. These contentions, however, were all overruled. "The tax in the present case," the court held, "though nominally upon the

[1] (1888), 125 U. S. 530.

shares of the capital stock of the company, is in effect a tax upon that organization on account of property owned and used by it in the State of Massachusetts, and the proportion of the length of its lines in that State to their entire length throughout the whole country is made the basis for ascertaining the value of that property." The fact that the value of tangible property outside of the State was not deducted was not thought sufficient to make the rule unjust. The act of 1866, it was declared, while it gave the right to erect telegraph lines on post-roads of the United States, did not exempt the property thereon from State taxation. No injunction, however, was granted to restrain the company from prosecuting its business until the amount of the tax should be paid, because the effect of such an injunction would be to restrain and interfere with the interstate commerce of the company.

By this case, therefore, the rule was established in the case of telegraph companies that the value of the property within the State could be determined by taxing the entire capital stock in the proportion which the mileage within the State bore to the entire mileage. There seems no escape from the conclusion that under this method the property, contrary to the rule in *Gloucester Ferry Co.* v. *Pennsylvania*, is taxed because of its use in interstate commerce. A proportionate part of the value of that commerce is included in the amount at which the property is appraised, and this is, in effect, a tax upon that business.

The case, however, was approved and followed in *Western Union Telegraph Company* v. *Taggart*.[1] In that case the tax was laid by Indiana upon the capital stock of the corporation in such proporation as the mileage in

[1] (1896), 163 U. S. 1.

Indiana bore to the total mileage, deducting from the capital stock the value of real estate subject to local taxation in Indiana. Referring to the prior decision and the case in which it was affirmed, the court said: "Those decisions clearly establish that a statute of a State, requiring a telegraph company to pay a tax upon its property within the State, valued at such a proportion of the whole value of its capital stock as the length of its lines within the State bears to the length of all its lines everywhere, deducting a sum equal to the value of its real estate and machinery subject to local taxation within the State, is constitutional and valid, notwithstanding that nothing is in terms directed to be deducted from the valuation, either for the valuation of its franchises from the United States, or for the value of its real estate and machinery situated and taxed in other States; unless there is something more showing that the system of taxation adopted is oppressive and unconstitutional."

Further comment is unnecessary, except that it would appear that when the value of real estate and other property subject to local taxation is deducted from the capital stock, it is much clearer that the tax is upon the interstate use to which the property is put, and also that it reaches property not subject to the jurisdiction of the State.

In the case of *Postal Telegraph Co.* v. *Adams*,[1] the tax in question, imposed by Mississippi, was not measured by the value of the capital stock, but was a fixed sum. It was termed a "privilege" tax, and the amount required to be paid by telegraph companies was $3,000 if one thousand miles or more of line were operated within the State, and $1 per mile if less than one thousand miles. The tax was "in lieu of other State, county, or municipal

[1] (1895), 155 U. S. 688.

taxes." The Postal Telegraph Company, a New York corporation, operating about four hundred miles of line within Mississippi, contended that the tax was a regulation of interstate commerce. The decision was that since the tax was in lieu of all other taxes, it was a reasonable tax upon the property of the company within the State. The court said: "This exposition of the statute brings it within the rule where *ad valorem* taxes are compounded or commuted for a just equivalent, determined by reference to the amount and value of the property. Being thus brought within the rule, the tax becomes substantially a mere tax on property, and not one imposed on the privilege of doing interstate business. The substance and not the shadow determines the validity of the exercise of the power."

"Property in the State," the court asserted, "belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a State, and may take the form of a tax for the privilege of exercising its franchises within the State, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon) and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes. . . .

"Doubtless, no State could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing, or operating an instrumentality of interstate or international commerce or for the carrying on of such commerce; but the value of property

results from the use to which it is put, and varies with the profitableness of that use, and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property, or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution."

Mr. Justices Brewer and Harlan dissented upon the ground that the tax, fairly construed, was upon the privilege of carrying on interstate commerce, and was therefore unconstitutional.

There can be little objection to this decision under the interpretation put upon it by the court. The tax was not measured in any way upon the interstate business. There may possibly be objection to the construction of the tax as a property tax instead of a privilege or license tax, as it was called by the State, but as to this it seems that the case could be of little authority except for its own facts.

The decision in *Western Union Telegraph Company* v. *Massachusetts* was again approved in *Western Union Telegraph Company* v. *Gottlieb*.[1] The method of assessment was not definitely prescribed by the statute of the State (Missouri), but the court regarded it, as construed by the Supreme Court of Missouri, as similar to that in the earlier case.

Rolling-stock: The case of *Pullman Car Company* v. *Pennsylvania*[2] extended the rule of apportionment to the taxation of rolling-stock. The Pullman Company was a corporation of Illinois. Under contracts it furnished cars to the various railroads. It was shown that a certain number of cars were always within Pennsylvania, although the cars were not continuously the same. To

[1] (1903), 190 U. S. 412.

[2] (1891), 141 U. S. 18.

ascertain the proportion of the company's property upon which it should be taxed, Pennsylvania assessed such proportion of the capital stock as the number of miles over which it ran cars within the State bore to the whole number of miles, in that and other States, over which its cars were run. This was held a "just and equitable method of assessment; and, if it were adopted by all the States through which these cars ran, the company would be assessed upon the whole value of its capital stock, and no more."

Mr. Justice Bradley, who had taken no part in the decision in *Telegraph Company* v. *Massachusetts*, dissented (Mr. Justices Field and Harlan concurring), upon the ground that the cars were employed constantly in interstate commerce and had no situs in Pennsylvania; and that a tax upon them was as much a burden upon interstate commerce as was a tax upon the freight transported from one State to another.

But admitting that when an average number were always within a State, they should be regarded for taxation purposes as having a situs within that State, the method of assessment employed by Pennsylvania in this case was, it is submitted, for the reasons already discussed, unconstitutional. The court proceeds upon the theory that the capital stock represents only the tangible property of the company, which is unsound.

A reasonable method of taxing rolling-stock under circumstances similar to those in the preceding case is that which was sustained in *American Refrigerator Transit Company* v. *Hall*.[1] The average number of cars always within Colorado was forty; and the State taxed that number, assessing the value of each car at $250,

[1] (1899), 174 U. S. 70.

which was admitted to be less than the cash value of the car.[1]

Railroads: The application of the rule of apportionment to interstate railroads was sustained in the cases of *Pittsburgh, etc., Railroad* v. *Backus*[2] and *Cleveland, etc., Railroad* v. *Backus*.[3] The tax, which was held constitutional, was based upon the capital stock in the same manner as the tax in *Telegraph Company* v. *Massachusetts*. The court, however, emphasized the fact that the Board of Apportionment was not absolutely bound to apply the method strictly. It was admitted that the rule might not always be applicable, as, for example, when the terminal facilities in one State gave to the property in that State a value out of proportion to a similar length of line in another State. The evidence in the case at bar tended to show that this was exactly such a case, but the Supreme Court held that the presumption was that the Board, in assessing the property, made allowance for the exceptional value of the property outside of the State.

In upholding the tax it was said: "When a road runs into two States, each State is entitled to consider as within its territorial jurisdiction and subject to the burden of its taxes what may perhaps not inaccurately be described as the proportionate share of the value flowing from the operation of the entire mileage as a continuous road. It is not bound to enter upon a disintegration of values and attempt to extract from the total value that which would exist if the miles of road within the State were operated separately."

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[1] Rolling stock is not taxable at the domicile of the corporation when it is permanently located outside of the State. *American Refrigerator Transit Co.* v. *Kentucky* (1905), 199 U. S. 194.

[2] (1894), 154 U. S. 421.

[3] (1894), 154 U. S. 439.

"The rule of property taxation is that the value of the property is the basis of taxation; . . . if property is taxed at its actual cash value it is taxed upon something which is created by the uses to which it is put. In the nature of things it is practically impossible — at least in respect to railroad property — to divide its value, and determine how much is caused by one use to which it is put and how much by another. Take the case before us; it is impossible to disintegrate the value of that portion of the road in Indiana and determine how much of that value springs from its use in doing interstate business, and how much from its use in doing business wholly within the State."

In this case the arguments in favor of the system are presented in their strongest light. As we have said, in view of the fact that the business of a railroad is an active investment, depending largely for its success upon the skill of the men managing it, it does not seem that the value of the property bears any necessary relation at all to the profits which are made in that business. Further than this, if such were not the case, when property is put to a use which is entirely beyond the jurisdiction of a State, as in interstate commerce, it should not be constitutional for the State to appraise the property at an amount which includes the profitable character of the use. While it would be difficult to determine how much of the value results from the use of the property in doing business wholly within the State, it seems by no means impossible.[1]

Of a different character is the case of *Erie Railroad* v. *Pennsylvania*.[2] The Erie Railroad, a company incorporated by New York, leased a railroad lying wholly

[1] See Cooke on the Commerce Clause, pages 268, 269, 270.

[2] (1894), 158 U. S. 431.

in Pennsylvania, and by agreement with a canal company, the latter was allowed the use of the road upon the payment of a certain sum, the amount of which was based upon the receipts of the canal company for transportation of passengers and freight over the railroad. Almost the entire amount of these receipts was derived from interstate commerce. A statute of Pennsylvania provided that certain corporations, domestic or foreign, doing business in the State, and owning or leasing to or from any other corporation, any railroad, etc., should pay a tax upon the gross receipts for tolls and transportation. The tax imposed upon the Erie Railroad under this statute was upon the sum received by it from the canal company for the use of the railroad.

Since "tolls" had been defined by the Supreme Court of Pennsylvania to be a tribute paid for a service or privilege, and not for transportation, the question to be decided was whether Pennsylvania could validly impose taxes on tolls paid by one company to another for the use of its property, where the company paying the tolls was engaged in interstate commerce, and the amount of the tolls was regulated by the amount of that business. It was contended that the effect of the tax was to burden interstate commerce, but the court held that it was a tax laid upon the corporation on account of its property in the railroad, the tax being measured by a reference to the tolls received.

This case presents a close question. It may be argued that while the State could, in taxing property, measure its value by a reference to the rental received from it in most cases, yet this could not be done when the amount of the rental was determined by the interstate commerce transacted by the lessee. Thus the amount of the tax did in fact rise and fall with the increase or decrease of that interstate traffic. The

argument would, of course, admit the right of the State to value the land itself and tax it upon such rental as should be received. But in this case, if the railroad and the canal company had been operating in partnership, the canal company carrying on the business and paying over to the railroad a certain portion of the gross receipts, those receipts in the hands of the railroad would probably be untaxable as receipts in so far as they were derived from interstate commerce. Is not the result the same economically, it may be contended, when the agreement is called a lease instead of a partnership?

But under the facts the decision appears to be sound. The object of the statute was to tax the tolls received as rental for the use of the property. The fact that the amount of the rental paid was determined by the amount of business transacted by the company paying it, could hardly be said to make the tax a tax upon that business. The amount of the tax, it is true, varied with the amount of the gross receipts received by the lessee, but this was the result of the contract between the lessor and lessee, the taxing statute in no way referring to such receipts. The gross receipts in the hands of the lessee could not be taxed, but when a portion of them was set aside and paid over as rental, that part assumed an entirely different character in the hands of the lessor. The only argument upon which it could be claimed that the tax was an actual burden upon interstate commerce was that the imposition of the tax would cause the Erie Railroad to increase the amount of rental demanded from the canal company, upon which the canal company would increase its rates for transportation. This, it is believed, was properly regarded as too remote to amount to an invasion of the jurisdiction of Congress.

The method of determining the value of the property within the State by the proportionate mileage system, as

we have so far considered it, has been to take the capital stock as the basis of computation of the value of the entire value of the property of the company. But it is not limited to this. From the cases of *Maine* v. *Grand Trunk Railroad, etc.*,[1] as interpreted by subsequent decisions, and *Wisconsin, etc., Railway* v. *Powers*,[2] it appears that the gross receipts, derived from both interstate and intrastate commerce, may be regarded as equivalent to the value of the property of the company. Thus in the first case a tax was upheld which was upon the gross receipts of an interstate railroad in the proportion which the mileage within the State bore to the total mileage; while in the second case the amount of the tax was determined by adding the income from intrastate commerce to such proportion of the income from interstate business as the mileage within the State bore to the entire mileage.

It is submitted that in principle there would appear to be absolutely no justification for these taxes. It is settled that the entire gross receipts derived from interstate commerce cannot be taxed, by whatever name the tax is called, because in substance such a tax is upon interstate commerce, which is not within the jurisdiction of a State. The mere fact that a portion of these receipts is taxed, instead of the entire quantity, does not alter the substance of the tax. If every State through which the railroad passes should impose a tax measured in the same manner, the entire gross receipts would be taxed. Accordingly, the law would seem to be that one State alone cannot burden interstate commerce by taxing the entire gross receipts, but several States together have that power, by calling it a property tax. In reality, the

[1] (1891), 142 U. S. 217; *supra*, page 95.

[2] (1903), 191 U. S. 379; *supra*, page 96.

tax is in each case upon the receipts, as is evidenced by the fact that if there were no business there would be no tax, and yet the property would still be there.

Express companies: It was at first thought that the method of apportionment according to mileage was not applicable to interstate express companies. There was no physical unity between the property of an express company such as existed in the case of a railroad or a telegraph company. All doubts, however, were dispelled by the case of *Adams Express Company* v. *Ohio.*[1]

A law of Ohio taxing the property of telegraph, telephone, and express companies doing business in the State required each company to file a return to the State Board setting forth the par and market value of its capital stock; the value of its entire property and of that located in Ohio; the entire gross receipts for the year from all business, and the receipts from business within Ohio. The following rule of assessment was provided: "In determining the value of the property of said companies in this State, . . . said board shall be guided by the value of said property as determined by the value of the entire capital stock of said companies, and such other evidence and rules as will enable said board to arrive at the true value in money of the entire property in the said companies within the State of Ohio, in the proportion which the same bears to the entire property of said companies, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid."

The property of the Adams Express Company in Ohio, under this method of appraisement, was assessed at $533,000, although its actual value was only $42,000. The real property of the company was taxed separately

[1] (1897), 165 U. S. 194.

as other real property in the State was taxed, and a tax was also laid on the gross receipts derived from intrastate commerce, so that the tax in this case was upon the horses, wagons, and other personal property of the company.

The Supreme Court (four justices dissenting) held the tax constitutional. "No more reason," said Chief Justice Fuller, in delivering the opinion, "is perceived for limiting the valuation of the property of express companies to horses, wagons and furniture, than that of railroad, telegraph, and sleeping car companies, to railroad, rails and ties; poles and wires; or cars. The unit is a unit of use and management, and the horses, wagons, safes, pouches and furniture; the contracts for transportation facilities; the capital necessary to carry on the business, whether represented in tangible or intangible property, in Ohio, possessed a value in combination and from use in connection with the property and capital elsewhere, which could as rightfully be recognized in the assessment for taxation in the instance of the companies as the others. . . It is a unity of use, not simply for the convenience and pecuniary profit of the owner, but existing in the very necessities of the case — resulting from the very nature of the business. . . .

"Assuming the proportion of capital employed in each of several States through which a company conducts its operations has been fairly ascertained, while taxation thereon, or determined with reference thereto, may be said in some sense to fall on the business of the company, it is only indirectly. The taxation is essentially a property tax, and, as such, not an interference with interstate commerce."

Mr. Justices White, Harlan, Field, and Brown dissented, upon the ground that by the system of taxation a proportionate part of the value of property located

outside of Ohio was added to the value of the property within the State, and that therefore Ohio was attempting to tax property beyond its jurisdiction; and also that as a result of the tax so heavy a burden was thrown upon interstate commerce as to threaten its destruction.

In refusing a petition for a rehearing,[1] Mr. Justice Brewer, on behalf of the court, explained more fully the property upon which the tax fell.

"The capital stock of a corporation and the shares in a joint stock company represent not only the tangible property, but also the intangible, including therein all corporate franchises and all contracts, privileges and good will of the concern. . . .

"Where is the situs of this intangible property? Is it simply where its home office is, where is formed the central directing thought which controls the workings of the great machine, or in the State which gave it its corporate franchise? Or is that intangible property distributed wherever its tangible property is located and its work done? Clearly, as we think, the latter. . . .

"It is also true that a corporation is, for purposes of jurisdiction in the federal courts, conclusively presumed to be a citizen of that State which created it, but it does not follow therefrom that its franchise to be is for all purposes to be regarded as confined to that State. For the transaction of its business it goes into various States, and wherever it goes as a corporation, it carries with it that franchise to be. But the franchise to be is only one of the franchises of a corporation. The franchise to do is an independent franchise, or rather a combination of franchises, embracing all things which the corporation is given power to do, and this power to do is as much a thing of value and a part of the

[1] (1897), 166 U. S. 185.

intangible property of the corporation as the franchise to be. Franchises to do go wherever the work is done."

The fact that the majority of the contracts which entered into the value of the capital stock were transactions of interstate commerce was not discussed. The court suggested that if a part of the property of the corporation was invested in United States bonds, and therefore exempt from taxation, the corporation should have disclosed that fact, and the State would have been required to deduct that amount from the value of the capital stock. Are not the contracts in interstate commerce and the profits from that business which enter into the value of the capital stock just as much exempt from State taxation as that part of the property which is invested in United States bonds? When the capital stock is taxed, the tax falls as directly upon the prospective profits from the business as it does upon the property of the corporation. The one is as much an element of value as the other.

This appears to be clearly recognized by the Supreme Court in the recent decision in the case of *Western Union Telegraph Company* v. *Kansas*.[1] In that case a tax of a certain per cent of the entire capital stock of the telegraph company, imposed by Kansas as a charge for the privilege of transacting intrastate business, was held unconstitutional. The court, speaking through Mr. Justice Harlan, said:

"So, in the case now before us, the exaction, as a condition of the privilege of continuing to do or doing local business in Kansas, that the Telegraph Company shall pay a *given per cent of its authorized capital stock*, is, for every practical purpose, a tax both on the company's local business in Kansas, and on its

[1] (1910), 216 U. S. 1.

interstate business, or on the privilege of doing interstate business; for, the statute, by its necessary operation, will accomplish precisely the result that would have been accomplished had it been made, *in express words*, a condition of doing local business that the Telegraph Company should submit to taxation upon both its interstate and intrastate business and upon its interests and property everywhere, as represented by its capital stock. The exaction made by the Kansas statute is as much a tax on the interstate business of the company and on its property outside of the State as a fee or tax on the occupation of an importer would be a tax on the property imported."

This is a clear recognition of the fact that the capital stock represents, not only the tangible property, but also the business. If a tax upon the entire capital stock of an interstate corporation is a tax on the interstate business, as much as "a fee or tax on the occupation of an importer would be a tax on the property imported," then a tax upon a proportionate part of the capital stock must be a tax on that proportion of the interstate business. To tax interstate commerce, or any part of it, is not within the power of a State.

It is, therefore, believed that the "mileage apportionment" system, based upon the actual value of the capital stock or the gross receipts, is unsound in principle. Nor is this extended discussion of the subject purely academic. In view of the late decisions it is possible, though perhaps not probable, that the court may overrule the line of cases which have sustained the application of the system. At any rate, if it is clearly unsound, there would be no valid reason for allowing it to be employed in the taxation of corporations chartered by Congress to carry on interstate commerce, if such action should be taken by the Federal Government.

The history of the court shows that while a long line of cases, which proceed on a principle which investigation shows to be unsound, will not be overruled, the principle, when once recognized as wrong, will not be extended to other cases presenting analogous but not identical facts. Thus the power of the State to tax property may not be diminished by federal incorporation, but the change to federal incorporation, though in a sense no reason, would justify the abandonment of an unsound principle.

C. *A State Can Tax the Intrastate Business of a Corporation Engaged also in Interstate Commerce.*

In dealing with the extent of the power of a State over its local commerce, we have at first practically the same problem as was presented in relation to the power of the State to tax a franchise which it has granted.

The original view was that the State had absolute control over its intrastate business, and could at its discretion grant or withhold from a corporation the privilege of carrying it on. Nor did the fact that the corporation had the right to enter the State to carry on interstate commerce give it also the right to carry on intrastate commerce without the consent of the State. And for the grant of the privilege the State could charge any sum it pleased.

If, under these circumstances, the amount of the charge, instead of being fixed arbitrarily, is measured on the gross receipts or the capital stock of an interstate corporation, is the tax constitutional? And here again we have the same two solutions, one, that the tax falls on that by which it is measured, and since measured on interstate commerce it is unconstitutional; and the other, that since the State may charge any sum it pleases, there can be no objection to a determination

of the amount by a reference to a particular business, whether that business is interstate commerce or not. It appears that in the present court there is a difference of opinion, with the majority in favor of the first view.

But at the present time there is an additional element which differentiates the taxation of intrastate commerce from the taxation of a franchise which the State has granted. This is the fact that there is a strong tendency to deny the absolute power of a State over its intrastate commerce with reference to a corporation which is also engaged in interstate commerce. The exercise of that power must not burden or interfere with rights protected by the Federal Constitution, and if the privilege of carrying on interstate commerce would be seriously impaired by a denial of the right to transact also a local business, the State has no power to prohibit the latter right. There is no real difference in substance between commerce which includes several States and that which is confined within the limits of a single State. The distinction based on State lines is entirely artificial. There seems but little doubt that the interstate business of a corporation would be burdened to a considerable extent if it were prohibited from engaging in local business in the various States, and this appears to be the attitude of the present court.

The language of the court in the case of *Maine* v. *Grand Trunk Railway*[1] is explained by the two solutions given above, if the tax therein be regarded as a tax upon the corporation for the privilege of exercising its franchises in intrastate commerce. It does not appear in the statement of facts nor in the opinion of the court that the corporation was engaged in local business in Maine, but in all probability it was. The tax in that case, it

[1] (1891), 142 U. S. 217; *supra*, page 96.

will be remembered, was called a tax for the privilege of exercising franchises within the State, and was measured upon the gross receipts in proportion to the mileage within the State.

The majority opinion declared that the right to exercise the franchise within the State was a valuable privilege which the State could withhold altogether, or grant upon such conditions as it saw fit; and the reference to the gross receipts was merely to determine an amount which might be fixed at an arbitrary sum. The dissenting opinion, on the other hand, argued that while the tax was called a franchise tax, it was laid in an unconstitutional manner, and was in reality a tax upon the gross receipts.

Regarding the tax in this light, the case illustrates the difference in opinion in the court between the two solutions mentioned, the majority adopting the second and the minority the first view.

Until recently there were no extreme cases upon this subject. In *Pacific Express Company* v. *Siebert*,[1] a tax upon an interstate express company for business done "in the State" was held constitutional, the tax being based only upon the gross receipts from the intrastate business. The decision seems unquestionably sound. The tax was not based in any way upon the interstate business of the corporation, but was confined to a business over which the State had jurisdiction. In *Osborne* v. *Florida*[2] a tax was sustained which required all express companies carrying on a local business to pay a license tax of a certain fixed amount, graduated according to the size of the town in which the company was located. The court held that the fact that the company

[1] (1892), 142 U. S. 339.

[2] (1897), 164 U. S. 650.

was also engaged in interstate commerce did not exempt it from paying for the privilege of carrying on a local business.

Subsequently, in *Pullman Company* v. *Adams*,[1] the tax in question was a privilege tax imposed by Mississippi upon sleeping car companies, amounting to $100 per car and twenty-five cents per mile for each mile of track over which cars were run within the State. The tax was a charge for the privilege of engaging in transportation wholly within the limits of the State. The company contended that the receipts from the local business did not equal its expenses, and that the tax was therefore a burden on the interstate traffic. The court, however, sustained the tax, declaring that the company had the right to choose between what points it would carry, and therefore could give up the carriage of passengers between points within the State if it objected to the tax.

This case was approved in *Allen* v. *Pullman Company*,[2] decided during the same year. A statute of Tennessee provided that sleeping car companies should pay $3,000 annually for the privilege of transporting one or more passengers between points wholly within the State. It was argued that the tax was so excessive as to be a thinly disguised attempt to tax the privilege of interstate traffic. To this the court, in holding the tax constitutional, replied: "If the payment of this tax was compulsory upon the company before it could do a carrying business within the State, and the burden of its payment, because of the minor character of the domestic traffic, rested mainly upon the receipts from interstate traffic, there would be much force in this objection. Upon this

[1] (1903), 189 U. S. 420.

[2] (1903), 191 U. S. 171.

proposition we are unable to distinguish this case from *Pullman Company* v. *Adams*."

The language of the court as quoted would seem to intimate that an excessive tax could not be made a condition precedent to the right to exercise the privilege of carrying on intrastate commerce. The right of the State to lay an excessive tax upon the privilege, however, was sustained, the corporation having the option to pay the tax or to give up all local transportation.

A decided change from the original theory was made by the decision of the court in the cases of *Western Union Telegraph Company* v. *Kansas*[1] and *Pullman Company* v. *Kansas*.[2] The same state of facts was involved in each of these cases, and they may therefore be considered together. By a statute of the State of Kansas all foreign corporations, even though engaged in interstate commerce, were required to pay a tax of a certain per cent of their entire capital stock before such corporation could have the privilege of transacting intrastate commerce within Kansas. The Western Union Telegraph Company in the first case, and the Pullman Company in the second, refused to pay the tax, and the State sought decrees ousting each corporation from the transaction of business within the State.

The majority of the court, speaking through Mr. Justice Harlan, declared that the name or avowed purpose of the tax, as asserted by the State, could not prevent the court from looking at its real effect. And the effect of a tax upon the entire capital stock was to burden all the business of the company, interstate and intrastate, and all its property interests in and out of the State, which were necessarily represented by that

[1] (1910), 216 U. S. 1.

[2] (1910), 216 U. S. 56.

capital stock. The tax, therefore, was a burden upon interstate commerce and a taxation of property beyond the jurisdiction of Kansas, and was unconstitutional. The court said: "That the Western Union Telegraph Company is engaged in both interstate and intrastate commerce is no reason, in itself, why Kansas may not in good faith require it to pay a license tax strictly on account of local business done by it in that State. But it is altogether a different thing for Kansas to deny it the privilege of doing such local business, beneficial to the public, except on condition that it shall first pay a given per cent of all its capital stock, representing all its property wherever situated, and all its business in and out of the State."

Mr. Justice White concurred: The tax, he said, was admittedly unconstitutional, because of want of due process. The argument for the State was that since the power of the State over its domestic commerce was absolute, the nature of the condition attached to the grant was wholly immaterial. But here the corporation had come within the State and engaged in local commerce, and had acquired valuable property for that purpose; and if the right of the State to impose an unconstitutional burden as a condition of continued enjoyment should be upheld, that property in the State would be practically confiscated. Such power on the part of the State could not be admitted. Further, the tax was a burden upon interstate commerce. When the power of a State to exclude a foreign corporation was absolute, such conditions could be attached to admittance as the State deemed proper, or the corporation could be refused admittance altogether. But with reference to a foreign corporation engaged in interstate commerce the power of the State was not absolute, but merely relative. There was no absolute power to exclude such a corporation,

and accordingly the State could not impose an unconstitutional burden as a price for the privilege of doing a local business along with the interstate traffic.

Mr. Justice Holmes, with whom concurred Chief Justice Fuller and Mr. Justice McKenna, dissented. The power of a State, he argued, in respect to business done wholly within the State, was absolute, and might extend to prohibition, regulation, or taxation. The power to tax, in itself, involved the power to destroy. All that the State did was to require the corporation to pay a certain sum for the privilege of carrying on that part of its business which it had no right to carry on without the consent of the State. "I confess my inability," said Mr. Justice Holmes, "to understand how a condition can be unconstitutional when attached to a matter over which the State has absolute and arbitrary control."

These decisions seem to establish definitely the proposition stated in our first solution, that a tax falls upon that by which it is measured; and that, though a State may have a right to charge for or tax a privilege, it cannot, under the pretense of laying such a tax, actually put the burden upon something which it cannot constitutionally tax directly.

But in the opinion of the court and the concurring opinion of Mr. Justice White, there appears also the idea that the intrastate business and the interstate business of a single corporation are so closely linked together that the States cannot be said to have absolute and arbitrary control over the intrastate business. Thus Mr. Justice Harlan said: "We cannot fail to recognize the intimate connection which, at this day, exists between the interstate business done by interstate companies and the local business which, for the convenience of the people, must be done or can generally be better and more economically done by such interstate companies rather than

by domestic companies organized to conduct only local business. It is of the last importance that the freedom of interstate commerce shall not be trammeled or burdened by local regulations which, under the guise of regulating local affairs, really burden rights secured by the Constitution and laws of the United States. While the general right of the States to regulate their strictly domestic affairs is fundamental in our constitutional system and vital to the integrity and permanence of that system, that right must always be exerted in subordination to the granted or enumerated powers of the General Government, and not in hostility to rights secured by the Supreme Law of the Land." And Mr. Justice White expressly said: "Moreover, to me it seems that where the right to do an interstate business exists, without regard to the assent of the State, a State law which arbitrarily forbids a corporation from carrying on with its interstate commerce business a local business would be a direct burden upon interstate commerce."

In his dissenting opinion Mr. Justice Holmes remarked: "If after this decision the State of Kansas, without giving any reason, sees fit simply to prohibit the Western Union Telegraph Company from doing any more local business there or from doing local business until it has paid $20,100,[1] I shall be curious to see upon what general ground that legislation will be assailed."

In answer to this, from the attitude of the majority of the court, there would appear to be but little doubt that an arbitrary prohibition would be held unconstitutional as a burden upon interstate commerce. And the result would apparently be the same if an excessive sum should be arbitrarily imposed by the State. The court distinguished the cases of *Osborne* v. *Florida*, *Pullman*

[1] Which was the amount of the tax in this case.

Company v. *Adams*, and *Allen* v. *Pullman Company*, in each of which tax was fixed at a definite amount, upon the ground that in those cases the tax was not at all disproportionate to the local business. An unlimited power to tax would in itself include the power to destroy. It would seem to follow, therefore, that an arbitrary sum charged by the State would have to be so reasonable that it could not be regarded "as a mere device to reach or burden the interstate traffic of the company." Under this view, the taxation of intrastate commerce is governed by the same rule as the taxation of property, — the value of the right must be the basis of taxation.

One other point should be noted in connection with these two decisions. It had been held in the case of *Security, etc., Insurance Company* v. *Prewitt*[1] that a State had the right to provide that if a foreign insurance company should remove to the federal courts a case which had been commenced in the State court, the license of the corporation to do business within the State should be thereupon revoked. It was not compelling the corporation to give up a constitutional right, the court said, but was merely giving it the option of doing so or of losing its privilege of carrying on a local business.

This decision Mr. Justice Holmes regards as being overruled by the Kansas cases. Thus it may be argued that in the one case the corporation was offered the option of giving up its constitutional right to appeal to the federal courts or of losing the right to transact intrastate business; in the other, it has the option of giving up its constitutional right to have its interstate commerce business unburdened by State taxes or of losing the same privilege of engaging in local business.

The majority of the court, however, distinguished

[1] (1905), 202 U. S. 246.

the cases upon the ground that the corporation in the Prewitt case was not engaged in interstate commerce. Without discussing the merits of the decision in *Insurance Company* v. *Prewitt*, this appears to be an absolutely sound distinction, because of the difference in the character of the options offered by the State. In the first case, if the corporation elects to give up its right to remove a case to the federal courts, it gives up a constitutional right which affects it only, which it might or might not have exercised irrespective of the State statute. But, in the second case, if the corporation elects to retain the privilege of carrying on local business, not only does it give up its constitutional right to have its interstate business unburdened, but the jurisdiction of Congress is invaded by the State. No State can tax interstate commerce with or without the consent of the corporation whose business is taxed, because such taxation amounts to a regulation of that commerce, and is an invasion of the exclusive jurisdiction of Congress. Therefore, upon the facts, the decision in *Insurance Company* v. *Prewitt* is not necessarily overruled by the later decisions in the Kansas cases. But, as a practical matter, in view of the feeling that the State has not absolute control over the intrastate business of an interstate commerce corporation, such a corporation could not be compelled to give up a constitutional right of any kind under penalty of forfeiting its right to carry on that business. The intrastate business is so closely connected with the interstate that the absolute power of prohibition does not reside in the State, and it would of course follow that the corporation could not be required to elect between the transaction of such business or the retention of a constitutional privilege. Accordingly, the imposition of a condition such as was held constitutional in the Prewitt case, that the corporation

lose the right to carry on the local business if it exercise its right to appeal to the federal court, would be beyond the power of a State if the corporation was also engaged in interstate commerce.[1]

D. A State Can Impose a Charge upon an Interstate Commerce Corporation for Local Governmental Supervision Rendered Necessary by the Way in which the Business is Carried on.

When a corporation, though engaged in interstate commerce, so carries on its business as to justify a police supervision of the property or instrumentalities used within a State, a reasonable fee may be charged for the enforcement of such local supervision. The mere fact that the business of the corporation is for the most part interstate commerce does not entitle it to special privileges without liability for compensation therefor. The exaction of such compensation does not place any burden upon the interstate business if it is a reasonable charge for the services performed. This was established by the case of *Western Union Telegraph Company* v. *New Hope*.[2] The charge upon the Telegraph Company was $1 per pole and $2.50 per mile of wire within the

[1] In *Southern Railway Co.* v. *Greene* (1910), 216 U. S. 400, it was held that an additional franchise tax for the privilege of doing business within the State, imposed only on foreign corporations, was a denial of the equal protection of the laws, where the foreign corporation so taxed had entered the State prior to the statute in question, in compliance with the requirements of the laws relating to foreign corporations, and had acquired permanent property within the jurisdiction. The classification which divided corporations doing exactly the same business with the same kind of property, into foreign and domestic corporations, was regarded as unreasonable and arbitrary.

[2] (1903), 187 U. S. 419.

limits of the borough of New Hope. It was argued that the sum derived from the tax more than equalled the cost of supervision, but the court did not consider that the facts in the case justified interposition.

The excess, however, must not be so great as to make it evident that the real object is to raise revenue. In *Atlantic, etc., Telegraph Company* v. *Philadelphia*[1] it was held that the reasonableness of the charge was a question, not for the court, but for the jury. "When it is said, in some of the cases, that such a question is for the determination of the court, it is not meant that the question may not properly be submitted to a jury. What is meant by such observation is that courts are not precluded from considering the reasonableness of the legislative act prescribing the terms and the amount of charges. . . . Regarding, then, the issue to be tried as one of fact, we think it is one which from its nature is eminently fit for the determination of a jury."

E. A State Can Charge for the Privilege of Using the Public Highways, although the Corporation Making Use of Them is Engaged in Interstate Commerce.

In this instance, also, there is no burden upon the interstate business if the charge is a reasonable return for the privilege granted. Thus, in *St. Louis* v. *Western Union Telegraph Company*,[2] a tax of $5 per pole for the privilege of using the streets of St. Louis was held constitutional. It was considered as a charge in the nature of rental for the use of the property of the city. Under the circumstances the amount was not regarded as unreasonable. It is probable that in a charge of this nature,

[1] (1903), 190 U. S. 160.

[2] (1893), 148 U. S. 92.

as in the case of a charge for local supervision, the question of reasonableness would be for the jury to decide.

II. Police and Other Regulations Affecting Corporations Engaged in Interstate Commerce.

The scope of the police power: The exact scope of the police power of a State is a matter of considerable dispute. It was defined by Chief Justice Taney as including all the powers which might be exercised by a sovereign government. "What are the police powers of a State? They are nothing more nor less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law, or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominions."[1]

This extremely broad view has not, however, been followed. It is often necessary, in determining the constitutionality of a State statute, to distinguish between an exercise of the power of police and legislation which may be passed under other reserved powers. It is, however, impossible to enumerate with exactness all the subjects which come within police legislation. For many years the scope of the power seemed restricted to laws passed for the protection of the health, morals, or safety of the public, but of late the decisions have been broader, and at present it may properly be said to include all matters which are immediately necessary

[1] *License Cases* (1847), 5 How. 504, 538.

for and advantageous to the public good. For example, State legislation requiring coal to be weighed before screening to determine miners' wages was held to be a valid exercise of the police power.[1] In this case the court said:

"It is, then, the established doctrine of this court, that the liberty of contract is not universal, and is subject to restrictions passed by the legislative branch of the government in the exercise of its power to protect the safety, health, and welfare of the people.

"It is also true that the police power of the State is not unlimited, and is subject to judicial review, and when exerted in an arbitrary or oppressive manner such laws may be annulled as violative of the rights protected by the Constitution. While the courts can set aside legislative enactments upon this ground, the principles upon which such interference is warranted are as well settled as the right of judicial interference itself.

"The legislature being familiar with local conditions is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ from the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless that act is unmistakably and palpably in excess of legislative power."

The most recent case upon the subject is that of *Noble State Bank* v. *Haskell*,[2] in which the depositors'

[1] *McLean* v. *Arkansas* (1909), 211 U. S. 539. See also, *Knoxville Iron Co.* v. *Harbison* (1901), 183 U. S. 13, in which a law requiring the redemption in cash of store orders issued by employers in payment of wages was held within the police power of the State.

[2] (1911), 219 U. S. 104.

bank guaranty law of Oklahoma was held constitutional because within the police power of the State. "It may be said in a general way," declared Mr. Justice Holmes, in delivering the unanimous opinion of the court, "that the police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality, or strong or preponderant opinion, to be greatly and immediately necessary to the public welfare."

Effect of police regulations upon interstate commerce: The extent to which police regulations may validly affect interstate commerce is, as we have seen, governed by the doctrine of the silence of Congress. If the effect is in a matter of national concern, the regulation is in conflict with the will of Congress, and is invalid; but if the effect is merely local, the law is valid in the absence of conflicting legislation by Congress.

But while it is settled that this is the test, its application in many cases is by no means easy. It is often extremely difficult to determine if the effect upon commerce is of national or local importance. If commerce among the States will be materially burdened as a result of the State legislation, unquestionably the statute is invalid. There are innumerable cases upon the subject, and no attempt will be made to cite all which are relevant, but merely to give sufficient illustrations to indicate the application of the principles involved.

Police regulations may affect (*a*) the articles carried or shipped by corporations in interstate commerce; (*b*) the corporations engaged in such commerce.

Effect upon articles carried in interstate commerce: As a general rule, it may be said that the free passage of articles of commerce between the States is a matter of national concern. Moreover, since the usual object

of transportation from one State to another is a sale, the character of interstate commerce is not lost until a sale in the original package, and the unrestricted right to make such a sale is also a matter of national concern.[1]

But the legislature of a State, for the protection of the morals or health of the community, may absolutely prohibit the manufacture and sale of a given article within the State;[2] and the question then arises, how far will such a regulation be effective in restraining the importation of that article from another State, or after importation, in preventing its sale in the original package?

In deciding this question the Supreme Court has apparently drawn a distinction between articles which are inherently dangerous to the health or safety of the people and those which are merely injurious to the morals, or which are objectionable for some other public reason. Articles which are infected with disease, or are otherwise dangerous to the health, have been declared not to be legitimate subjects of commerce, and therefore may be excluded by a State without an invasion of the jurisdiction of Congress.[3] It may perhaps be better to say that, since the health of the community is of primary importance, a State regulation directly designed to protect the health, which affects in its operation articles carried in interstate commerce, will be regarded as of local importance, which will be valid until Congress itself legislates upon the subject.

The inspection laws of the States are illustrations of the application of this principle: Diseased cattle may

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[1] *Leisy* v. *Harden* (1890), 135 U. S. 100.

[2] *Kidd* v. *Pearson* (1888), 128 U. S. 1.

[3] *License Cases* (1847), 5 How. 504, 599; *Bowman* v. *Railway Co.* (1888), 125 U. S. 465.

be excluded,[1] as may impure or adulterated articles of food,[2] and it is probable that dangerous explosives may be kept out altogether, or admitted only upon the taking of precautionary measures.

The law, however, must be clearly an inspection law, and not designed to promote home products. For example, a law which prohibited the sale of fresh beef unless the animal from which it was taken was inspected by a local inspector twenty-four hours before slaughter was held unconstitutional.[3] It was clear that the object of the statute was to prohibit the importation of beef from other States.

Distinction likewise must be made in the statute between articles which are sound and those which are unsound. To illustrate, a law of Missouri, passed ostensibly to prevent the spread of disease among live stock, prohibited absolutely the introduction of Texas cattle during a certain period. The Supreme Court, while conceding the right of the State to enact reasonable inspection laws to prevent the importation of diseased cattle, held the law in question unconstitutional, because under its terms perfectly healthy cattle were excluded.[4]

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[1] *Missouri, etc., Railway Co.* v. *Haber* (1898), 169 U. S. 113; *Reid* v. *Colorado* (1902), 187 U. S. 137.

[2] See *Schollenberger* v. *Pennsylvania* (1898), 171 U. S. 1.

[3] *Minnesota* v. *Barber* (1890), 136 U. S. 313. So, also, was held invalid a statute which provided that it should be unlawful to offer for sale meat from animals slaughtered one hundred miles or more from the place where offered for sale, unless inspected by local inspectors, a heavy fee being charged for such inspection. *Brimmer* v. *Rebman* (1891), 138 U. S. 78.

[4] *Railroad* v. *Husen* (1877), 95 U. S. 465. For the same reason, a law of Pennsylvania which prohibited the sale of oleomargarine was declared inapplicable to a sale in the original package of oleomar-

When an article cannot be said to be inherently and directly dangerous to health or safety, but for other reasons its manufacture and sale within the State may be prohibited, the prohibition cannot operate to prevent the importation of the article from another State, or its sale in the original package, in the absence of permissive legislation by Congress. Within this class are such articles as spirituous liquor and tobacco. If these articles were directly injurious to the health, as, for example, if the liquor was adulterated or the tobacco impure, the importation could undoubtedly be prohibited.

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garine imported from another State. Oleomargarine, it was declared, when properly made, was pure, and was a legitimate subject of commerce, and the law of Pennsylvania made no attempt to distinguish between that which was pure and that which was impure. *Schollenberger* v. *Pennsylvania* (1898), 171 U. S. 1.

In *Plumley* v. *Massachusetts* (1894), 155 U. S. 461, a police regulation which prohibited the sale of oleomargarine when colored to represent butter was held valid even as applied to the sale in the original package of oleomargarine imported from another State. The commerce clause, it was said, did not authorize the commission of fraud in the sale of foodstuffs. There was a strong dissent upon the ground that oleomargarine was a legitimate subject of commerce, and that by its silence Congress expressed its will that interstate traffic should be free from State restrictions. It may be seriously questioned whether the subsequent decision in *Schollenberger* v. *Pennsylvania* has not restricted the scope of *Plumley* v. *Massachusetts* to cases in which the article is actually impure; in other words, when the State regulation is a health law, and not passed merely for the prevention of fraud. If the State has the power to prohibit the sale of pure articles of food when prepared to represent other food products, logically it should have the same power with reference to the sale of articles which are not food, as, for example, cotton prepared in imitation of wool. Such legislation as to articles carried in interstate commerce should, it is believed, be within the jurisdiction of Congress only.

The three cases of *Bowman* v. *Railway Co.*,[1] *Leisy* v. *Harden*,[2] and *In re Rahrer*[3] furnish an excellent illustration of the doctrine of the silence of Congress. In the first case it was held that a State law which in effect prohibited the importation of spirituous liquor from another State was in conflict with the will of Congress that interstate commerce should be free from State restrictions. *Leisy* v. *Harden* carried this one step further, holding that since the character of interstate commerce was not lost until a sale in the original package, a State law which prohibited that sale was also in conflict with the will of Congress as expressed by its silence.

In 1890, by the Wilson act,[4] Congress declared that the sale of liquor in the original package should be subject to the police laws of the State in which the sale took place. This law was held constitutional in the case of *In re Rahrer*. By it Congress had expressed its will that the State police regulations should be applicable to liquor as soon as it came within the State, and therefore, the sale in the original package could be prohibited equally with the sale of liquor which was manufactured and sold within the State.[5]

Effect upon corporations engaged in interstate commerce: The extent to which police regulations may affect the corporations engaged in interstate commerce before there is an invason of the jurisdiction of Congress is governed by the same principles. It is impossible to formulate a

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[1] (1888), 125 U. S. 465.

[2] (1890), 135 U. S. 100.

[3] (1891), 140 U. S. 545.

[4] 26 Stat. 313.

[5] Under the Wilson act, the State regulation can apply only after delivery to the consignee. *Heyman* v. *Southern Railway Co.* (1906), 203 U. S. 270.

more definite test by which the validity or invalidity for this reason of all State regulations can be ascertained. It is a question of degree, and each case must depend largely upon its own facts. If a material burden is placed upon the interstate traffic, or the right to carry it on, the statute will not be sustained; but in general, if it is clearly for the protection of the local community, it will not be invalid because in its operation interstate commerce is incidentally affected.

A few illustrations may be given. For example, a statute requiring engineers on all trains to pass an examination and take out a license was held valid even as applied to engineers on interstate trains.[1] The law obviously was designed for the protection of the people of the State. Similarly, laws regulating the speed of trains in their passage through certain communities are essentially local, and trains engaged in interstate commerce must conform to the regulations, unless Congress has expressly legislated upon the subject.[2] In what appears to be an extreme case, a State law which prohibited the running of freight trains on Sunday was held applicable to through trains carrying interstate freight.[3]

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[1] *Smith* v. *Alabama* (1888), 124 U. S. 465.

[2] *Erb* v. *Morasch* (1900), 177 U. S. 584.

[3] *Hennington* v. *Georgia* (1896), 163 U. S. 299. State laws regulating the heating of cars have been held to apply to interstate trains. *New York, etc., Railroad Co.* v. *New York,* (1897) 165 U. S. 628. In this case, also, the law would appear to be of more than local importance. If each State through which the railroad passes should adopt different regulations, it is obvious that the interstate operations of the company would be materially burdened.

A statute providing that all persons should be given equal privileges on public conveyances, without discrimination because of race or color, is invalid when applied to an interstate carrier. *Hall* v. *DeCuir* (1877), 95 U. S. 485.

Regulation of intrastate commerce: The regulation of that commerce which is confined within the limits of a single State is among the reserved powers of a State, but in exercising that power care must be taken not to invade the jurisdiction of Congress. A statute passed in the exercise of this power, which in its operation burdens interstate commerce, is, as in the case of a law passed under the police power, invalid.

It is well settled that a State can regulate the rates of railroad corporations, domestic or foreign, which are charged in the conduct of intrastate commerce. The fact that the corporation is also engaged in interstate commerce does not exempt it from this regulation of its local business.[1] The effect of low rates required within the State may be to increase the interstate rates, but up to the present time the Supreme Court has not deemed this a sufficiently direct burden upon interstate commerce to invalidate the State law.[2] And it has been held that the rates of a warehouse located in a State may be regulated by the State, although a large part of the business of the warehouse is essential to interstate commerce.[3]

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[1] *Smyth* v. *Ames* (1898), 169 U. S. 466; *Gulf, etc., Railway Co.* v. *Texas* (1907), 204 U. S. 403.

[2] A case is now pending in the Supreme Court involving this question. The State of Minnesota materially reduced the maximum rates which could be charged by railroads for intrastate transportation. The contention was made on behalf of several interstate railroads that the result of the enforcement of the reduced rates would be to burden the interstate trade of these companies. This contention was upheld and the State law declared unconstitutional by the Circuit Court in the case of *Shepard* v. *Northern Pac. Railway Co.* (1911), 184 Fed. 765. In the opinion of the court, delivered by Sanborn, J., there is a collection of the cases in which State laws affecting interstate commerce have been held valid, and, also of those in which the State laws have been declared to burden interstate commerce to an unconstitutional extent.

[3] *Munn* v. *Illinois* (1876), 94 U. S. 113.

It was regarded as a local matter upon which Congress had not legislated.

But the regulation of interstate rates is a matter over which Congress alone has jurisdiction, and a State law is unconstitutional in so far as it attempts to control such rates.[1] The regulation of the State cannot apply to any part of an interstate shipment, no matter how much of the transportation is within the limits of the State.[2] Nor can the reasonableness of State rates be determined by taking into consideration the amount of interstate business transacted.[3]

But, on the other hand, interstate railroads may be compelled to comply with local regulations which do not seriously interfere with the transaction of interstate commerce. The reasonableness of the requirement, of course, largely determines its validity. Thus, trains engaged in interstate transportation may be required to stop at all towns of a certain size,[4] unless the regulation applies to all through trains, or requires such trains to go some distance out of their course.[5] A requirement that rates shall be posted in depots is applicable to interstate railroads. And a State law requiring proper

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[1] *Hanley* v. *Kansas City Railway Co.* (1903), 187 U. S. 617.

[2] *Wabash, etc., Railway Co.* v. *Illinois* (1886), 118 U. S. 557.

[3] *Smyth* v. *Ames* (1898), 169 U. S. 466. State regulations requiring a railroad to furnish cars to shippers within a certain time are invalid when applied to interstate shipments. *Houston, etc., Railroad Co.* v. *Mayes* (1906), 201 U. S. 321. A State cannot prescribe affirmative regulations for the delivery of interstate telegrams. *Western Union Telegraph Co.* v. *Pendleton* (1887), 122 U. S. 347, but can impose a liability for failure to deliver with due diligence, in the absence of legislation by Congress upon the subject. *Western Union Tel. Co.* v. *James* (1896), 162 U. S. 650.

[4] *Lake Shore, etc., Railroad* v. *Ohio* (1899), 173 U. S. 285.

[5] *Illinois Central Railroad Co.* v. *Illinois* (1896), 163 U. S. 142.

facilities for the transference of cars at the junction of two railroads was held not to be a regulation of interstate commerce.[1]

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[1] *Wisconsin, etc., Railroad Co.* v. *Jacobson* (1900), 179 U. S. 287.

Mr. Cooke, in his recent work on the commerce clause, contends that the validity of State laws which regulate the conduct and liability of those engaged in interstate commerce should depend upon the class for whose benefit such conduct or liability is regulated. There are at least three classes, he says, for whose benefit such regulations may be passed: (1) The "public," comprehending those residing in the State; (2) Those enjoying the benefit of transportation wholly within the State; (3) those enjoying the benefit of transportation within the scope of the commerce clause. For the benefit of the first two classes, the power to regulate exists to a large extent, being almost without limit so far as the second class is concerned. But for the benefit of the third class, he contends, the State should have no power to pass regulations.

While this view appears entirely sound, it is not clear that it furnishes a more definite or satisfactory test then the determination of whether the State law affects interstate commerce in a matter of national or local importance. Indeed, it seems but another mode of expressing the latter test.

CHAPTER VI.

STATE LEGISLATION WITH REFERENCE TO FEDERAL CORPORATIONS ENGAGED IN INTERSTATE COMMERCE.

There are, of course, comparatively few cases which deal with the limitation of State legislation with reference to corporations chartered by the Federal Government. An examination of the principles announced in these cases will, however, enable us to determine to a considerable extent the changes, if any, which would result if a federal incorporation system should be adopted for interstate transportation and industrial companies. As in the preceding chapter, the power of the State will be discussed with reference, first, to taxation, second, to police and other regulations.

I. State Taxation of Federal Corporations.

In the preceding chapter we found that five principles may be regarded as settled with reference to taxation of State corporations, foreign or domestic, which are engaged in interstate commerce. In this chapter it is proposed to discuss the application of each of these principles to corporations chartered by Congress to transact such commerce.

A. A State Cannot Tax the Privilege of Engaging in Interstate Commerce.

There can be no question but that this principle would apply equally to federal corporations as to State corporations. So far as the right to burden or otherwise

regulate interstate commerce is concerned, it can make no difference by which sovereignty the corporate powers are conferred.

The case of *McCullough* v. *Maryland*[1] was the first case in which was involved the constitutionality of State taxation of a means employed by the Federal Government to carry into effect one of the powers conferred upon it by the Constitution. In that case a tax imposed by Maryland upon the notes issued by the national bank was held unconstitutional. Only those subjects over which the sovereign power of a State extended, it was declared, could be taxed by the State, and that sovereign power did not extend to a means employed by the Federal Government to execute one of its powers. "The States have no power," declared Chief Justice Marshall, "by taxation or otherwise, to retard, impede, burden, or in any manner control, the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the National Government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared."

A corporation chartered by Congress to carry on interstate commerce would be a means of executing the power to regulate that commerce conferred upon Congress by the Constitution, and therefore, irrespective of the principle established in the case of State corporations, the interstate operations of such a corporation could not be taxed or otherwise regulated by a State.

Consistently with this, the corporation could not, of course, be excluded from the limits of a State, nor compelled to pay a tax or charge for the privilege of exercising its franchises within the State in interstate business. A tax could not be measured upon its gross

[1] (1819), 4 Wheat. 316.

receipts from interstate commerce, nor upon the freight transported by it between the States. All of the decisions upon this subject dealing with the taxation of State corporations would apply with even greater force to federal corporations. The State would not only be invading the jurisdiction of Congress over interstate commerce, but also would be burdening the operations of a legitimate means employed by the Federal Government.

B. A State Can Tax Property which has a Situs within the Jurisdiction, although it is Employed in Interstate Commerce.

In the case of State corporations which carry on an interstate commerce business, we have found that a tax upon the property within the State, if laid in the same manner as on other property, does not necessarily result in burdening the operations of the company. So far as an interference with interstate commerce is concerned, the same would of course be true if the company is incorporated by the Federal Government. Nor does the additional fact that the federal corporation would be a means of executing an express power vested in Congress exempt its property from such a tax. In *McCullough* v. *Maryland*, Chief Justice Marshall declared: "This opinion does not deprive the States of any resources which they originally possessed. It does not extend to the tax paid by the real property of the bank, in common with the other real property within the State." There is therefore no constitutional objection to a tax upon the property of a federal corporation. And such were the decisions in the two cases of *Thompson* v. *Railroad*[1] and *Railroad Co.* v. *Peniston*.[2]

[1] (1869), 9 Wall. 579.
[2] (1873), 18 Wall. 5.

In the first of these cases the railroad in question was not incorporated by Congress, but was granted valuable franchises by it. Kansas, the State of incorporation, taxed the property of the company located within the State. The express method of taxation does not appear in the report, but it seems clear that it was the same as was applied in the case of other property within the State. The constitutionality of the tax was sustained by a unanimous decision.

"There is a clear distinction," said the court, "between the means employed by the government, and the property of agents employed by the government. Taxation of the agency is taxation of the means; taxation of the property of the agent is not always, or generally, taxation of the means. No one questions that the power to tax all property, business, and persons, within their respective limits, is original in the States and had never been surrendered. It cannot be so used, indeed, as to defeat or hinder the operations of the National Government; but it will be safe to conclude, in general, in reference to persons and State corporations employed in government service, that when Congress has not interposed to protect their property from State taxation, such taxation is not obnoxious to that objection."

In the second case the question was directly presented whether the fact that the corporate powers were granted by Congress altered the result. It was decided in the negative. The tax was laid by Nebraska upon the property of the Union Pacific Railroad, a corporation chartered by Congress. The property within the State, roadbed, depots, bridges, furniture, etc., was assessed upon a valuation of $16,000 per mile. The majority of the court held that the case did not differ from *Thompson* v. *Railroad.*

"It is, therefore, manifest that exemption of Federal

agencies from State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal powers."

The tax in this case, it was held, was not upon the operations or the franchises of the company, but was exclusively upon the real and personal property, taxed in common with all other property in the State of a similar character. Mr. Justice Swayne concurred in the judgment upon the ground that Congress might, but did not, exempt the property from all State taxation.

A strong dissenting opinion was filed by Mr. Justice Bradley (Mr. Justice Field concurring). The corporation, it was argued, was a means employed by the Federal Government, and this was a direct tax upon that means. The case was not analogous to a tax upon the real estate of the national bank, because it was not essential to the operations of the bank that it should hold real estate, while the property of a railroad, on the other hand — roadbed, depots, etc., — was absolutely necessary to, and a part of, the operation of the road. *Thompson* v. *Railroad* was totally different, because in that case the corporation owed its existence to State laws, and was properly subject to State regulations and taxation. The only interest the Federal Government had in the corporation was the contract with it, and that contract was not taxed. In this case, on the contrary, the corporation itself was a direct means

employed by Congress to execute its power to regulate interstate commerce, and a tax upon it was in conflict with the decision in *McCullough* v. *Maryland*.

While the arguments of the learned judges who dissented are very forcible, it is believed that the sounder view is that expressed by the majority of the court. The property within the State enjoys the protection of the laws of the State, and should contribute to its support as other property within the State contributes, and if the burden of taxation is no heavier than that imposed on other property, it does not seem that the operations of the company would be materially impeded. Upon this point little difference can be perceived between the taxation of the property of State corporations engaged in interstate commerce and that of federal corporations carrying on the same business. The test of the validity of the tax is whether or not it substantially burdens the interstate operations of the company, and the fact would be the same whether the corporation is chartered by a State or by the Federal Government. With reference to the view of Mr. Justice Swayne that Congress possesses the power to exempt the property from State taxation, it is sufficient to say for the present that no reason is perceived why such a power should reside in Congress to any greater extent than in the case of State corporations. This will be discussed at greater length in connection with the cases dealing with the regulation of the intrastate business of federal corporations.

Assuming the position of the majority to be sound, it is apparently settled by these cases that a tax imposed by a State upon the local property of a federal corporation does not necessarily interfere with the efficient exercise of the powers conferred by Congress upon the corporation. In each case the method of assessment

was evidently the same as was used in the taxation of other property within the State. There was no attempt in either case to include in the assessment the value of the interstate business transacted by the corporation. In the case of State corporations engaged in interstate commerce, the most general method employed in the valuation of the property within the State is the apportionate mileage system, taking as a basis the market value of the capital stock. Should this method be applied also to federal corporations engaged in interstate trade?

Upon the theory that the actual value of the capital stock represents the value of the entire property of the company, it must be admitted that the question is the same as in the taxation of State corporations. The test of the constitutionality or unconstitutionality of the tax is whether or not it burdens the interstate operations, and since by the theory the tax is upon the property only, there is no interference with the interstate business of the company, whether it be chartered by Congress or by a State.

But this theory, it is submitted, is clearly unsound. To summarize briefly our former discussion, the prospect of profit from the interstate business is at least as important an element in the market value of the capital stock as is the value of the tangible and intangible property. To appraise the property at an amount which includes the prospective profits from the interstate business amounts to a tax upon that business just as directly as if the business were taxed separately from the property, which beyond question would be unconstitutional. If, therefore, the theory is wrong, it should be abandoned, and no necessity would exist for its application to corporations chartered by Congress.

But the later theory upon which the proportionate mileage system is supported is that the value of the franchise is equal to the value of the capital stock less the value of the tangible and intangible property; and this franchise, as a property right, has a situs wherever the tangible property is located and can be taxed with that tangible property. Upon this theory there would be a material difference when the franchise was granted by the Federal Government. A grant of corporate powers by Congress, although it may be a valuable property right, is not subject to State taxation.

In the case of *California* v. *Central Pacific Railroad*[1] the question before the court was whether a tax was constitutional which was imposed by California upon the property of the Central Pacific Railroad located within the State. The assessment was made under the same statute which has been considered in connection with the case of *Central Pacific Railroad* v. *California.*[2] No definite method was prescribed. The State Board valued the franchise, roadway, roadbed, rails, and rolling stock, while all the taxable property was assessed in the county or municipality where it was located. Each railroad was required to make a statement to the Board showing the mileage within the State and the total mileage, the gross earnings in the State and the entire gross earnings, etc. The lower court had found that the assessment of the State Board included the full value of all franchises held by the railroad, and it was argued against the tax that franchises granted by Congress were wrongfully assessed. This objection was sustained by the Supreme Court, and it was held that the value of such franchises was so blended with the

[1] (1888), 127 U. S. 1.

[2] (1896), 162 U. S. 91; *supra*, page 115.

value of the other property as to make the entire assessment void.

"A franchise," declared Mr. Justice Bradley, delivering the unanimous opinion of the court, "is a right, privilege or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents acting under such conditions and regulations as the government may impose in the public interest, and for the public security.

"Recollecting the fundamental principle that the constitution, laws and treaties of the United States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a State. The power conferred emanates from, and is a portion of, the power that confers it. To tax it is not only derogatory to the dignity, but subversive of the powers of government, and repugnant to its paramount sovereignty. . . .

"The taxation of a corporate franchise merely as such, unless pursuant to a stipulation in the original charter of the company, is the exercise of an authority somewhat arbitrary in its character. It has no limitation but the discretion of the taxing power. The value of the franchise is not measured like that of property, but may be ten thousand or ten hundred thousand dollars, as the legislature may choose. Or, without any valuation of the franchise at all, the tax may be arbitrarily laid."

The method of assessment employed in this case was probably not the proportionate mileage system based upon the capital stock, but by the decision any tax upon the federal franchise is unconstitutional, whether

its value be fixed at an arbitrary sum, or be determined by subtracting the value of the tangible and intangible property from the actual value of the capital stock. And it would of course follow that any valuation of the property which included the value of the franchise would likewise be unconstitutional.

Therefore, if we admit the soundness of the theory that the value of the franchise is equal to the value of the capital stock less the value of the tangible and intangible property, although it seems unsound for the same reason as the first theory (because including the value of prospective profits from the business), the proportionate mileage system is clearly inapplicable to the taxation of federal corporations.

But it may be argued that this method of appraisement has been held constitutional when applied to corporations which have received franchises from the Federal Government. Thus the Western Union Telegraph Company, by accepting the terms of the act of Congress of 1866, became entitled to construct and maintain its lines on the post-roads of the United States. Massachusetts taxed the market value of the capital stock of the company in proportion to the mileage within the State, and in the case of *Western Union Telegraph Company* v. *Massachusetts*[1] this tax was held constitutional as a tax upon the property within the State. The court decided that there was no taxation of the franchise received from Congress. Would not the result have been the same if the franchise granted by the Federal Government had been the franchise of corporate capacity?

This, however, does not necessarily follow. The franchise or privilege received under the act of 1866, as

[1] (1888), 125 U. S. 530; *supra*, page 122.

interpreted by the court, merely gives the right to use the post-roads upon payment of compensation. No State could prevent the telegraph company from erecting its lines along a post-road within the limits of the State, but the corporation could be compelled to make suitable compensation for the property taken. In *St. Louis* v. *Telegraph Company*[1] it was held that the municipality could charge a reasonable sum for the use of the public streets by a telegraph company, although the streets were post-roads of the United States and the company had accepted the provisions of the act of 1866. It seems, therefore, that the right conferred by the statute is in the nature of the right of eminent domain. When it has been exercised and the lines constructed, as in *Western Union Telegraph Company* v. *Massachusetts*, it is not an element entering into the value of the capital stock, any more than is the right of eminent domain which has been granted by the State and exercised by the corporation.

There is no sound theory, it is believed, which would justify the extension of the proportionate mileage system to the taxation of the property of a federal corporation engaged in interstate transportation.

A further point, a question of fact, would arise in connection with federal trading or industrial corporations, chartered for the purpose of buying and selling between the States. If it be conceded that the proportionate mileage system should be applicable to federal transportation companies, such as railroad, telegraph, and express companies, would there be such unity between the property of an industrial corporation as to justify the appraisement of its property under the same system?

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[1] (1893) 148, U. S. 92; *supra*, page 149.

In *Adams Express Company* v. *Ohio*,[1] it was held that the unity, while something more than the mere unity of ownership, need not be a physical unity. "It is a unity of use," said the court, "not simply for the convenience or pecuniary profit of the owner, but existing in the very necessities of the case — resulting from the very nature of the business. The same party may own a manufacturing establishment in one State and a store in another, and may make profit by operating the two, but the work of each is separate. The value of the factory is not conditioned on that of the store or *vice versa*, nor is the value of the goods manufactured and sold affected thereby. The connection between the two is merely accidental and growing out of the unity of ownership."

Under this definition it may be seriously questioned whether the unity between the property of a federal trading company would be more than a unity of ownership. The business of such a company would seem closely analogous to that of a company owning a manufactory in one State and a store in another, or to that of a company established in one State and sending agents through other States. Accordingly, it is doubtful if, as a matter of fact, the property of the company could be valued as a unit and assessed in accordance with the mileage system.

C. *A State Can Tax the Intrastate Business of a Corporation Engaged also in Interstate Commerce.*

We have concluded that the intrastate business transacted by an interstate corporation is so closely connected with the interstate business that a federal corporation chartered to engage in interstate commerce would have

[1] (1897), 165 U. S. 194; *supra*, page 133.

the incidental right to transact local business within a single State.[1] Does the fact that this right results from the federal charter remove the intrastate business from State taxation?

In the case of *Osborne* v. *National Bank*,[2] a tax imposed by Ohio upon a branch of the national bank located in that State was held unconstitutional, upon the authority of *McCullough* v. *Maryland*.[3] Counsel for the State argued, that in addition to its business for the government the bank carried on a private banking business, and that this business could be taxed by the State in the same manner as any other intrastate business could be taxed. The court, however, speaking through Chief Justice Marshall, held that while undoubtedly the bank could transact private business as well as national business, yet the corporation was created for a public purpose, and this private business was essential to make it an efficient instrument for the Federal Government. It was inseparable from the public business and was clearly exempt from State taxation.

Upon the authority of this case it may be argued that the intrastate business transacted by a federal commerce corporation would be exempt from all state taxes. If the corporation has the right to carry on intrastate business, it is because it is essential to its interstate operations and necessary to make it an efficient means or instrument to carry out the purposes of the Federal Government. A State tax, therefore, upon the right, would be a burden upon the exercise of the powers conferred by Congress, and would be unconstitutional, as was the tax upon the private business of the bank.

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[1] *Supra*, pages 17, 18.

[2] (1824), 9 Wheat. 738.

[3] *Supra*.

But there seems this difference between the private banking business of a national bank and the intrastate business of a federal corporation engaged in interstate commerce. It is absolutely essential for the bank to carry on a private business in addition to the business it transacts for the government, because otherwise it would be hardly possible for the bank to exist. As Chief Justice Marshall expressed it, it is "the vital spirit which alone can bring it into useful existence." Without it, as a mere "depository of, and vehicle for, the conveyance of the treasury of the nation," the bank could not be sustained on a paying basis. Since this private business was a part of the very life of the bank, it was essential that it be free from all State interference or taxation. A tax upon it, therefore, was a matter of national importance, and in conflict with the will of Congress. This was particularly true of the tax laid by Ohio, which was imposed only upon the national bank, and was clearly intended to drive the corporation from the State.

On the other hand, the intrastate business of an interstate commerce corporation, while necessary to make the corporation a really fit instrument, can hardly be said to be absolutely essential, — "the vital spirit" necessary to bring the corporation into existence. Since it is a reasonable and proper incident to the interstate operations, Congress can grant the right to the corporation and the State cannot prohibit its exercise. But the business is exercised wholly within the State and should be subject to reasonable state regulation and taxation to the same extent that the intrastate business of state corporations engaged in interstate commerce is subject to such regulation and taxation. In either case the State should be allowed to exercise control over the intrastate business as long as it does not thereby substantially burden interstate commerce. The doctrine of the silence

of Congress, it is submitted, should have exactly the same application to federal commerce corporations as to State corporations transacting an interstate business.

Apparently, however, the cases which have arisen in connection with the intrastate business of the transcontinental railroads incorporated by Congress carry the doctrine to a greater extent and apply it to all State laws, whether of taxation or regulation, which affect those corporations. The cases in question deal with the regulation of intrastate rates.[1]

In the first case, *Reagan* v. *Mercantile Trust Company*, a railroad commission appointed under a statute of Texas attempted to regulate the intrastate rates of the Texas & Pacific Railway, a federal corporation. On behalf of the company it was argued that the right to charge and collect tolls was a franchise or privilege received from Congress, which the State had no power to limit or qualify. The court, however, held that the State could regulate the local rates unless Congress had indicated its intention to the contrary. Quoting from *Railroad* v. *Peniston*[2] the test that the validity of the State tax depended upon its effect upon the operations of the company, the court said:

"Similarly we think it may be said that conceding to Congress the power to remove the corporation in all its operations from the control of the State, there is in the act creating this company nothing which indicates an intent on the part of Congress to so remove it, and there is nothing in the enforcement of the State of reasonable rates for transportation wholly within the State which will disable the corporation from discharging

[1] *Reagan* v. *Mercantile Trust Company* (1894), 154 U. S. 413; *Smyth* v. *Ames* (1898), 169 U. S. 466.

[2] (1873), 18 Wall. 5; *supra*, page 163.

all the duties and exercising all the powers conferred by Congress. By the act of incorporation, Congress authorized the company to build its road through the State of Texas. It knew that, when constructed, a part of its business would be the carrying of persons and property from points within the State to other points within the State, and that in so doing it would be engaged in a business, control of which is nowhere by the Federal Constitution given to Congress. It must have known that in the nature of things, the control of that business would be exercised by the State, and if it deemed that the interests of the nation and the discharge of the duties required on behalf of the nation from this corporation demanded exemption in all things from State control, it would unquestionably have expressed such intention in language whose meaning would be clear. Its silence in this respect is satisfactory assurance that, in so far as this corporation should engage in business wholly within the State, it intended that it should be subjected to the ordinary control exercised by the State over such business. Without, therefore, relying at all upon any acceptance by the railroad corporation of the act of the legislature of the State, passed in 1873 in respect to it, we are of the opinion that the Texas & Pacific Railway Company is, as to business done wholly within the State, subject to the control of the State in all matters of taxation, rates, and other police regulations."

This case was followed in *Smyth* v. *Ames*.[1] In the act of Congress incorporating the Union Pacific Railroad it was provided that whenever the net earnings of the road reached a certain amount, "Congress may reduce the rates of fare thereon, if unreasonable in

[1] *Supra.*

amount, and may fix and establish the same by law." From this it was argued that Congress had reserved to itself the exclusive control of rates, both interstate and local, to be charged by the railroad, and that therefore the statute of Nebraska regulating the intrastate rates could not be applied to the Union Pacific Railroad. This argument was not sustained, the court holding that Congress had not by that provision withdrawn from the States the right to regulate local rates, but merely reserved the right to intervene under certain circumstances and establish reasonable rates. "Until Congress, in the exercise either of the power specifically reserved, . . . or its power under the general reservation made of authority to add to, alter, amend or repeal that act, prescribes rates to be charged by the railroad company, it remains with the States through which the road passes to fix rates for transportation beginning and ending within their respective limits."

From these cases it appears that the power to regulate in any way the intrastate rates charged by a federal railroad corporation is a local matter upon which the States may legislate unless Congress shall have expressly provided otherwise. The right to tax the local business would seem to be within the power of the State to the same extent as the right to regulate it, provided that the tax was not measured upon the intrastate business, or, if an arbitrary amount, was so reasonable as not to be disproportionate to the amount of local business transacted.

But the *dicta* of the court in these decisions, apparently adopting the view of Mr. Justice Swayne, in *Railroad* v. *Peniston*,[1] vests in Congress the power to remove the federal corporation in all its operations

[1] *Supra*, page 165.

from state regulation or taxation. As mentioned before, it is submitted that Congress has such power to no greater extent than in the case of state corporations engaged in interstate trade. If the effect of the operation of the state law is to burden substantially the interstate commerce of a corporation, it comes into conflict with the will of Congress and is invalid, by whatever sovereign the corporate powers may have been granted. But if there is no interference with interstate commerce, as, for example, the court has decided in the case of a reasonable state tax upon the property of a state corporation within the jurisdiction, then in the case of a federal corporation there is no interference with the means employed by Congress to regulate interstate commerce, and the same tax should be valid, and Congress should have no power to prohibit it.

There is another theory upon which the power of Congress to exempt the corporation from the operation of all State laws may have been based. The better view of a franchise, it is believed, is that it is a grant of certain privileges to be employed by individuals in the pursuit of particular undertakings. But if the theory that a franchise creates a legal entity — an artificial person — be adopted, will this justify the attitude of the court in the cases cited? The idea may have been that this juristic person created by the Federal Government should be subject only to the regulations of the Federal Government, unless Congress, by its silence, should permit the States to act; that otherwise, to allow the States to act would be to sanction an invasion of federal sovereignty. But this result does not seem to follow. If the grant of the charter creates an artificial person, then the power of Congress to exempt it from State regulations should be no greater than in the case of a real person engaged in interstate commerce, and it

could hardly be contended that Congress could prohibit State taxation of the property of an individual because of the fact that he was carrying on an interstate trade. The attitude of the court cannot, therefore, it appears, be explained satisfactorily upon this theory.

D. A State Can Impose a Charge upon an Interstate Commerce Corporation for Local Governmental Supervision Rendered Necessary by the Way in which the Business is Carried on.

E. A State Can Charge for the Privilege of Using the Public Highways, Although the Corporation Making Use of Them is Engaged in Interstate Commerce.

There is no reason to suppose that these principles would apply any the less to a federal corporation than to a State corporation. Nor would the doctrine of silence apply. It is not the case of laws passed under the reserved powers of the State which in their operation affect corporations engaged in interstate commerce; it is a reasonable charge for services rendered or as compensation for the use of land. A federal charter could not confer the right to demand special services from a State without making any return therefor, nor could the corporation be empowered to occupy property, either of an individual or of the State, without compensating the owner. If reasonable, such charges do not in any way hinder or burden the operations of the company, or impair its efficiency as a governmental means. As in the case of State corporations, the question of reasonableness would undoubtedly be for the jury.

II. Police and Other Regulations Affecting Federal Commerce Corporations.

Local regulations passed under the police or other reserved powers which in their operation affected federal corporations would be analogous to the taxation of the property and the regulation of the intrastate business. In the absence of legislation by Congress, the law would be the same as it now is with reference to State corporations engaged in interstate commerce.

The power of the State to regulate the intrastate commerce has already been considered in discussing the power to tax that business. There is only one situation which appears to require further comment.

A federal industrial corporation is chartered by Congress with power to buy and sell tobacco among the States. As an incidental right the corporation could also make sales wholly within the limits of one State. If, then, a State within which the corporation is transacting business, should, under its police power, prohibit the sale within the State of all tobacco, or of tobacco in the form of cigarettes, would the statute operate to deprive the corporation of its incidental right to make intrastate sales?

In the absence of legislation by Congress, it is believed that it would so operate. To say that a federal corporation engaged in interstate commerce has the incidental right to carry on an intrastate business merely means that the State cannot arbitrarily prohibit that right, upon the theory that it has absolute control over all local business. The corporation has the right to enter the State to carry on interstate commerce, and the performance of this function would be materially burdened and the efficiency of the corporation as a governmental means impaired if a local business could

not also be transacted. But State regulations govern the carrying on of that local business unless Congress expressly provides otherwise, and the power to regulate its internal commerce is no more firmly vested in the State than the power to enact police regulations for the protection of its citizens. It would seem that any reasonable police regulation such as that in question should be regarded as a matter of local concern, even though it would operate to destroy an incidental right. The effect, it is true, may be to burden the interstate trade of the corporation in cigarettes; but the object would be to protect the morals or health of the people of the State, and if Congress should deem it more expedient for the operations of the corporation to be unobstructed, the power to relieve it from such State legislation would lie in its hands.

Summary: As a result of a federal incorporation system, there would be few absolute changes in the relation of the States to corporations engaged in interstate commerce. At the present time no State can tax the privilege of transacting interstate commerce, so in this respect the law would be unaltered. The taxation of the local property of a federal corporation, the taxation and regulation of its intrastate business, and the application of reasonable police regulations to its local operations, would all, it appears, be matters within the power of the States to the same extent as at present in the case of State corporations, at least in the absence of legislation by Congress to the contrary. But it is believed that the local property could be taxed only as other property in the State is taxed, and could not be regarded as part of a unit or going concern, and a proportionate part of the actual value of the capital stock or of the gross receipts assessed to determine its value. It has been definitely decided that the franchise granted by the

Federal Government is exempt from State taxation. The fee for incorporation, which under the present system is paid to the State, would, of course, under federal incorporation, go to the Federal Government.

The producing function of federal corporations: A federal corporation could be given the absolute right to manufacture or produce in the District of Columbia and the Territories only.[1] Therefore, so far as that function is concerned, it would have the character merely of a corporation of the District or of a Territory. The right to manufacture within the limits of a State would be determined by the same laws which govern the admission of any foreign corporation not engaged in interstate commerce. As a result, the admission or exclusion of the corporation would be within the discretion of the State, and such conditions could be attached to the right to carry on the business as the State should think fit, provided that there was no interference with the exercise of some power belonging to the United States. After admission, the power of the State to control and regulate such business would be exactly the same as its power over occupations of a similar nature carried on within its limits by State corporations.

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[1] *Supra*, pages 19-21.

CHAPTER VII.

JURISDICTION OF FEDERAL COURTS OVER SUITS BY OR AGAINST FEDERAL CORPORATIONS.

The jurisdiction of the federal courts may be established either because of the subject-matter of the suit or because of the character of the parties to the suit. The Constitution provides:

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under this authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States — between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign states, citizens, or subjects."

This clause, however, does not of itself directly vest in the federal courts jurisdiction in the cases mentioned. As it has been construed, it merely authorizes Congress to pass legislation extending the jurisdiction of the federal courts to all, or a part only, of the suits which may come within the terms of the clause. The Constitution provides that, "In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction." With the exception of these specific cases, it must be shown, to enable a federal

court to assume jurisdiction in a particular case, not only that the case is one which is within the scope of the above clause, but also that an act of Congress has been passed giving to the court jurisdiction in that class of cases. "It is settled law," the Supreme Court has declared, "that except in the cases of which this court is given by the Constitution original jurisdiction, the judicial power of the United States is to be exercised in its original or appellate form, or both, as the wisdom of Congress may direct." [1]

In pursuance of this power Congress has, in various statutes, enumerated the cases which shall be subject to the jurisdiction of the federal courts. Included in these are suits arising under the Constitution and laws of the United States and suits in which there is a diversity of citizenship between the parties. In the absence of express legislation by Congress, it would be necessary to show the application of one of these two provisions to bring suits by or against a federal corporation within the jurisdiction of the federal courts.

In the case of *Osborne* v. *Bank* [2] it was definitely decided that a corporation created by Congress as a means of executing a power expressly conferred by the

[1] *Railroad* v. *Mississippi* (1880), 102 U. S. 135, 140.

An example of the discretion of Congress in not conferring such jurisdiction to the extent provided for in the Constitution is found in the twenty-sixth section of the Judiciary Act of 1789. By that section it was provided that when a suit was brought in a State court, if either of the parties claimed a right, title, or privilege under the Constitution or laws of the United States, and the decision of the State Court was against the existence of such right, title, or privilege, the defeated party had a right to appeal to the Supreme Court of the United States. There is an express omission to provide for an appeal in cases where the State courts affirm the right, title, or privilege claimed.

[2] (1824), 9 Wheat. 738.

Constitution could be authorized to sue in the federal courts, the reason being that such suits were cases arising under a law of the United States.

"The case of the bank," said Chief Justice Marshall, "is a very strong case of this description. The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on these contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by the United States. It is not only itself the mere creature of a law, but all its actions and all its rights are dependent on the same law. Can a being, thus constituted, have a case which does not arise literally, as well as substantially, under the law?

"Take the case of a contract, which is put as the strongest against the bank. When a bank sues, the first question which presents itself, and which lies at the foundation of the cause, is, has this legal entity a right to sue? Has it a right to come, not into this court particularly, but into any court? This depends on a law of the United States. The next question is, has this being a right to make this particular contract? If this question be decided in the negative, the cause is determined against the plaintiff; and this question, too, depends entirely on a law of the United States."

The doctrine of this case was expressly affirmed in the *Pacific Railroad Removal Cases*,[1] in which it was held that suits brought against the Union Pacific Railroad and the Texas & Pacific Railroad, both of which

[1] (1885), 115 U. S. 1.

corporations were chartered by Congress, were suits arising under a law of the United States and could be removed by the corporations to the federal courts.[1]

Therefore, so far as its interstate commerce business is concerned, a federal transportation or trading company would unquestionably have the right to sue in, or remove suits against it to, the federal courts. And it seems unquestionable that this would be true also with reference to the intrastate business of the company, because the right to transact such business would result as incidental to the right to carry on interstate operations.

It is somewhat more difficult to decide whether the jurisdiction of the federal courts would extend to suits arising in connection with the producing function of the corporation. As a producing corporation, it would have the status of a corporation of the District of Columbia or of a Territory, since Congress has no power to incorporate manufacturing companies except under its complete governmental authority over those sections.

It might be argued that Congress, when exercising this authority, has merely the character of a local legislature, and the legislation enacted thereunder is not a law of the United States. If this be true, it would be necessary to prove diversity of citizenship to entitle the corporation to sue in the federal courts.

Practically, for the purpose of establishing the jurisdiction of the federal courts, a corporation may be said to be a citizen of the State in which it is chartered. While this is not strictly true, the result is the same, the theory being that the stockholders of a corporation which brings suit or is sued are conclusively presumed to

[1] See also *Roberts* v. *Northern Pacific Railroad Co.* (1895), 158 U. S. 1, 22.

be citizens of the State which granted the corporate privileges.[1] Therefore, as a manufacturing corporation, the federal trading company would, for jurisdictional purposes, be treated as a citizen of the District of Columbia or a Territory. It has been definitely decided that a citizen of the District or of a Territory is not a citizen of a State within the meaning of the clause which extends the judicial power to suits between citizens of different States.[2] Accordingly, if this view be adopted, in all cases arising out of its manufacturing business, the corporation would have no right to bring suit in, or remove suits to, the federal courts.

But the sounder view, it is believed, is that a statute of Congress, though passed by virtue of its power as the local legislature for the District or for a Territory, is nevertheless a law of the United States. The Constitution vests in Congress the power to legislate for these sections of the country, and while this legislation is necessarily local, it would seem to be as much a law of the United States as a statute passed by Congress in the exercise of its authority as the national legislature.

To illustrate, it is a settled principle that if a statute of Congress is inconsistent in part or in whole, with a prior treaty, the treaty is repealed to the extent that it is in conflict. Would it make any difference in the application of this principle that the statute in question was enacted by Congress under its power to legislate for the District of Columbia? Let us suppose, for example, that a treaty with a foreign nation provides that the citizens of that country shall be permitted to

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[1] *Blake* v. *McClung* (1898), 172 U. S. 239; *Southern Railway Co.* v. *Allison* (1903), 190 U. S. 326.

[2] *New Orleans* v. *Winter* (1816), 1 Wheat. 91; *Hepburn* v. *Ellzey* (1805), 2 Cranch 226.

become residents of any part of the United States. After the treaty becomes effective, Congress passes a statute declaring that no citizen of any foreign country shall reside in the District of Columbia. Could it be said that this was merely a local act, and not a law of the United States, so that, therefore, it could not repeal *pro tanto* the terms of the treaty?

That this would not be true would appear settled by the case of *Cohens* v. *Virginia*,[1] in which Chief Justice Marshall said: "The clause which gives exclusive jurisdiction is, unquestionably, a part of the Constitution, and, as such, binds all the United States. Those who contend that acts of Congress, made in pursuance of this power, do not, like acts made in pursuance of other powers, bind the nation, ought to show some safe and clear rule which shall support this construction, and prove that an act of Congress, clothed in all the forms which attend other legislative acts, and passed in virtue of a power conferred on, and exercised by Congress, as the legislature of the Union, is not a law of the United States, and does not bind them. . . . But we know that the principle does not apply; and the reason is, that Congress is not a local legislature, but exercises this particular power, like all its other powers, in the high character, as the legislature of the Union."

Therefore, even with reference to the producing function of the federal corporation, it would be created under a law of the United States, and the jurisdiction of the federal courts would extend to cases arising in connection with that business.

But, as was said before, the extent of this jurisdiction is subject to the discretion of Congress. Therefore, it would be entirely possible for Congress to provide that

[1] (1821), 6 Wheat. 264, 424.

the fact that the company was incorporated under a federal law should not, by itself, be sufficient to entitle it to invoke the jurisdiction of the federal courts. Or, if not advisable to go to this extent, an express exception to the jurisdiction of the federal courts could be made in the case of suits arising in connection with the manufacturing business of the corporation, where the suit was not, for some other reason, within that jurisdiction.[1]

[1] In the new "Judicial Code," enacted by Congress March 3, 1911, it is expressly provided that no case under the act of April 22, 1908, relating to the liability of railroads to their employees, brought in a State court of competent jurisdiction, shall be removed to any court of the United States.

CHAPTER VIII.

THE MEANING OF THE TERM "COMMERCE AMONG THE SEVERAL STATES."

Granting that federal incorporation would be an appropriate means of regulating interstate commerce, and that it would be within the power of Congress to make such incorporation compulsory, it is obvious that a clear comprehension of what constitutes interstate commerce would be necessary to ascertain what companies would in fact come within the provisions of the statute.

There is by no means an exact conception of the meaning of the term "commerce among the several States." Many definitions have been given, but none of them are sufficiently accurate to leave a clear idea of the distinction between those transactions which are included and those which are not.

By the dictionaries, commerce is defined as "the exchange or buying and selling of commodities; extended trade or traffic";[1] "interchange of goods, merchandise, or property of any kind; trade; traffic."[2] From these definitions it would appear that in its ordinary meaning commerce is confined to transactions in which goods are sold or exchanged.

That such was not the meaning of the word as used in the Constitution was early decided. "The subject to be regulated is commerce," said Chief Justice Marshall, in *Gibbons* v. *Ogden*,[3] "and . . . it becomes necessary

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[1] Webster's International Dictionary.

[2] Century Dictionary.

[3] (1824), 9 Wheat. 1, 189.

to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities. . . . This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more — it is intercourse."

This broad and general statement has formed the basis for subsequent decisions. Commerce has been held to include navigation, the transportation of persons and property, and communication by means of telegraph. "Commerce," it has been said, "is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all of its forms, including the transportation, purchase, sale, and exchange of commodities between . . . the citizens of the different States."[1] A definition frequently quoted is as follows: "Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities."[2] In a comparatively recent case the court said: "Commerce among the States embraces navigation, intercourse, communication, traffic, the transit of persons, and the transmission of messages by telegraph."[3]

These definitions have been criticised as too broad and also as inaccurate. It is said that all intercourse among the States is not within the scope of commerce, the criticism being based upon the line of cases which hold that a contract of insurance made by citizens of different States is not a part of interstate commerce. It is

[1] *Welton* v. *Missouri* (1875), 91 U. S. 275, 280.

[2] *Mobile* v. *Kimball* (1880), 102 U. S. 691, 702.

[3] *Lottery Case* (*Champion* v. *Ames*) (1903), 188 U. S. 321, 352.

further argued that to say that commerce includes traffic, the sale and exchange of goods, is inaccurate, because such transactions are not included unless transportation follows, and if there is that transportation, it is commerce regardless of whether a sale preceded or is to follow.

This second criticism appears entirely justified, and it is believed that the inaccuracy results from the attempt to define the word "commerce" separately. It is not commerce alone which is to be regulated, but only that commerce which crosses State lines. The transportation or crossing of State lines is the essential element which is necessary to bring the transaction within the jurisdiction of Congress. And an examination of the cases seems to justify the conclusion that this transportation may be of practically anything, — that all "intercourse" between the States, as Marshall said, is comprised within the scope of the term interstate commerce. Intercourse is defined as "intimate connection or dealings between persons or nations, in common affairs and civilities, in correspondence or trade; communication; interchange of thought and feeling"; (Webster); "communication between persons or places" (Century). It is certain that at least all intercourse for commercial purposes which crosses State lines is commerce within the regulating power of Congress, and in view of the apparent tendency of the court, it does not seem too much to say that the transportation of persons, property, or ideas in any form and for any purpose is also included.[1]

[1] Mr. Cooke, in his book on the commerce clause, submits the following definition: "Commerce consists in transportation (not necessarily all transportation but certainly) including transportation of persons, tangible property, and (at least under certain conditions) of intelligence." Cooke on the Commerce Clause, No. 4.

But it must be remembered that the mere fact that two persons are citizens of different States does not necessarily make their dealings interstate commerce. For example, a citizen of New York, while in Pennsylvania purchases goods from a citizen of Pennsylvania; the transaction is not one of interstate commerce, because it does not involve transportation across State lines. For the same reason, a contract between two persons situated at the time in different States is not a transaction of interstate commerce unless the performance of it involves a transportation between the States. The communication by which the contract is made, if sent from one State to another, is intercourse among the States, and its passage would be commerce within the regulating power of Congress, just as in the first illustration the passage from New York to Pennsylvania would be interstate commerce, but this would not make the contract itself a part of such commerce. Apparently, this is the explanation of the insurance cases, which will later be discussed at greater length.

An examination of the cases is necessary to determine the correctness of these conclusions.

Persons as the subject-matter of commerce: In an early case it was decided that the transportation of passengers from one State to another was included within the scope of interstate commerce.[1] Here of course there was no idea of trade, but the passage of persons from State to State was an important part of the intercourse between the States. No distinction has ever been made between persons traveling for purposes of commerce (in the ordinary meaning of the word) and those traveling merely for pleasure.

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[1] *Gibbons* v. *Ogden* (1824), 9 Wheat. 1; see also, *Passenger Cases* (1849), 7 Howard 283.

Going a step further, it was held in *Covington Bridge Co.* v. *Kentucky*[1] that the crossing of a bridge over a boundary river between two States by foot passengers was interstate commerce. "The thousands of people who daily pass and repass over this bridge," declared the court, "may be as truly said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool."

Would it be any the less interstate commerce if, instead of walking over a bridge which connected two States, a person should enter a State by road in a carriage or automobile? Or could a State tax all persons for the privilege of walking into the State? It would seem to follow as a logical conclusion from this case that any crossing of State lines in person is interstate commerce within the meaning of the Constitution. It is no answer to say that the case dealt with an interstate highway, for certainly the passage across the bridge was not interstate commerce because it was over an interstate highway, but the bridge itself was an instrument of commerce because of the passage over it.

Property as the subject-matter of commerce: It is well settled that interstate commerce includes the transportation of property from one State to another, irrespective of the motive or purpose which actuates such transportation.[2] "Transportation for others, as an independent business, is commerce, irrespective of the purpose to sell or retain the goods which the owner may entertain with regard to them after they shall have been delivered."[3]

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[1] (1894), 154 U. S. 204.

[2] State Freight Tax Case (1872), 15 Wall. 232; *Railroad* v. *Husen* (1877), 95 U. S. 465; *Lottery Case* (*Champion* v. *Ames*) (1903), 188 U. S. 321; *St. Clair County* v. *Interstate Transfer Company* (1904), 192 U. S. 454.

[3] *Hanley* v. *Railroad Co.* (1903), 187 U. S. 617, 619.

So also the transportation by a man of his own property is interstate commerce, as is evidenced by the case of *Kelly* v. *Rhoads*.[1] Sheep in charge of an agent of their owner were driven through the State of Wyoming on their way from Utah to a point in Nebraska, for the purpose of being shipped. They traveled slowly, and were allowed to graze. While in Wyoming they were taxed by the State under a statute which taxed all live stock brought into the State for the purpose of being grazed. The court held that the sheep, being driven through the State to a market, were subjects of interstate commerce, and therefore exempt from taxation.

Here there was no transportation for others as an independent business, but transportation by a man of his own property. It is true that there was present an intent to ship the sheep to market on their arrival in Nebraska, but this in itself could not give the character of interstate commerce to the transaction. If, while the sheep were in transit, the owner should change his intention and determine that instead of shipping he would pasture them in Nebraska, would their passage across Wyoming thereby lose its character of interstate commerce? That the intention to sell is immaterial is shown by the case of *Interstate Commerce Commission* v. *Railroad*,[2] in which the cars of an interstate railroad employed in the transportation of fuel for the company's own use were held to be instruments of interstate commerce.

There may be some question whether property must not have value to be an article of commerce. Thus in the *Lottery Case*[3] it was argued that a lottery ticket

[1] (1903), 188 U. S. 1.
[2] (1910), 215 U. S. 452.
[3] (1903), 188 U. S. 321.

was of no real value in itself, and, therefore, was not a subject of commerce. The court did not decide that such was the test, but said: "If that were conceded to be the only legal test as to what are to be deemed subjects of the commerce that may be regulated by Congress, we cannot accept as accurate the broad statement that such tickets are of no value."

There is no reason to believe that such a test will ever be adopted by the court. In fact, in view of the recent decision in *International Text-book Company* v. *Pigg*,[1] in which correspondence through the mails was held to be a part of interstate commerce, it may well be concluded that any tangible property, whether it can be said to have a marketable value or not, may become an article of commerce.[2]

Intelligence as the subject-matter of commerce: Interstate commerce is not limited to what is tangible, but also includes intercourse between the States by means of the telegraph.[3] "A telegraph company occupies the

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[1] (1910) 217 U. S. 91.

[2] What is a legitimate article of commerce is a judicial question to be determined by the Federal Courts, and not by the State legislatures. *Bowman* v. *Railway Co.* (1888), 125 U. S. 465. This is obviously sound, because to allow the States to decide what is or is not an article of commerce would reduce the power of Congress to a nullity.

Of course, where property is under the proprietorship of the State, as in the case of game, or oysters in public beds, the State, by virtue of this proprietorship, can prevent such property from becoming the subject of interstate commerce. *McCready* v. *Virginia* (1876), 94 U. S. 391; *Geer* v. *Connecticut* (1896), 161 U. S. 519.

[3] *Pensacola Telegraph Company* v. *Western Union Telegraph Company* (1877), 96 U. S. 1; *Telegraph Company* v. *Texas* (1881), 105 U. S. 460; *Western Union Telegraph Company* v. *Pendleton* (1887), 122 U. S. 347; *Leloup* v. *Mobile* (1888), 127 U. S. 640; *Western Union Telegraph Company* v. *Alabama* (1889), 132 U. S. 472.

same relation to commerce as a carrier of messages, that a railroad company does as a carrier of goods. Both companies are instruments of commerce, and their business is commerce itself." [1]

No distinction is made between messages sent for commercial purposes and the mere transmission of ideas. Thus in *Telegraph Company* v. *Texas*,[2] a State tax on messages sent by a telegraph company was held unconstitutional in so far as it was levied on any inter-state message. Indeed, it is obvious that any attempt to distinguish between commercial and other messages would be so difficult and impracticable as to be beyond consideration.

Intercourse by means of the telephone is undoubtedly interstate commerce, although there has been no direct decision in the Supreme Court.[3] Communication by wireless telegraphy would likewise seem to be included, and logically no reason is apparent why communication by word of mouth between persons located in different States is not within the scope of the commerce clause, although, of course, as a practical matter, it is improbable that the question would ever arise.

Correspondence through the mails is under federal control irrespective of the power of commerce, but this also, it appears, is a part of interstate commerce. As stated, in the recent case of *International Text-book Company* v. *Pigg*,[4] it was held that the business of imparting information through the mails in the form

[1] *Telegraph Company* v. *Texas* (1881), 105 U. S. 460, 464.

[2] *Supra.*

[3] In *Richmond* v. *Southern Bell Telephone, etc., Co.* (1889), 174 U. S. 761, it was held that a telephone company was not a telegraph company within the meaning of the act of 1886. The relation of the telephone to commerce was not discussed.

[4] (1910), 217 U. S. 91.

of letters, papers, and books, was interstate commerce. The *International Text-book Company*, better known as the International Correspondence School, a corporation located in Pennsylvania, employed agents in other States to solicit scholars and to collect money due upon completed courses. Instruction papers, text-books, and illustrative apparatus were sent to those who became pupils, and the course of study was pursued by correspondence through the mail. The Kansas agent of the school maintained an office at his own expense. The State of Kansas exacted a license fee from foreign corporations seeking to do business within the State. Suit was brought by the Text-book Company in Kansas against Pigg to recover unpaid tuition fees, and judgment was given in the State courts for the defendant on the ground that the required license fee had not been paid by the corporation. This judgment was reversed by the Supreme Court of the United States, the court, through Mr. Justice Harlan, saying:

"If intercourse between persons in different States by means of telegraphic messages conveying intelligence or information is commerce among the States, which no State may directly burden or unnecessarily encumber, we cannot doubt that intercourse or communication between persons in different States, by means of correspondence through the mails, is commerce among the States within the meaning of the Constitution; especially where, as here, such intercourse and communication really relates to matters of regular, continuous business, and to the making of contracts and the transportation of books, papers, etc., appertaining to such business."

This case, decided during the past year, shows clearly the attitude of the court in favor of a broad interpretation of the scope of interstate commerce; and

it seems reasonable and justifiable to conclude that any crossing of State lines by persons, property, or intelligence, is within the meaning of the clause as used in the Constitution.

Contracts within the commerce clause: In a preceding chapter, comment has been made upon the fact that the power of Congress is not confined to the actual transportation of articles between the States. A contract which in its performance necessarily involves such transportation is itself a transaction of interstate commerce.[1] Cases upon this point usually arise where a State taxes the business of an agent of a foreign corporation who solicits orders for goods to be sent into the State, such taxation being uniformly held invalid as an attempt to charge for the privilege of engaging in interstate commerce.[2]

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[1] *Addystone Pipe and Steel Co.* v. *United States* (1889), 175 U. S. 211.

[2] *Robbins* v. *Shelby County Taxing District* (1887), 120 U. S. 489; *Stockard* v. *Morgan* (1902), 185 U. S. 27. It does not alter the character of the business that the goods are sent to the agent for delivery, instead of directly to the purchaser, *Rearick* v. *Pennsylvania* (1906), 203 U. S. 507; even though the agent breaks the bulk and fits the parts together before delivery, *Caldwell* v. *North Carolina* (1903), 187 U. S. 622; nor that a part of the order is not accepted until seen by the purchaser, *Dozier* v. *Alabama* (1910), 218 U. S. 124. Questions with reference to the time of passage of title in interstate shipments, or at whose risk the goods are sent, are immaterial, *Brennan* v. *Titusville* (1894), 153 U. S. 289; *Norfolk etc. Railway Co.*, v. *Sims* (1903), 191 U. S. 441; *American Express Co.* v. *Iowa* (1905), 196 U. S. 133. It is obviously immaterial that an agent acts for more than one principle. *Stockard* v. *Morgan* (1902), 185 U. S. 27.

But if goods are sent to an agent, who then endeavors to sell them, the business is domestic commerce. *Emert* v. *Missouri* (1895), 156 U. S. 296. The sale is not followed by an interstate transfer of the goods, and the foreign origin of the goods cannot of itself make the transaction interstate commerce.

Just as a contract involving in its performance the interstate transportation of property is a part of interstate commerce, so it would seem to follow that a contract involving in its performance the interstate transportation of persons or of intelligence is also within the scope of the commerce clause. A close case upon this point is that of *Williams* v. *Fears*.[1] The State of Georgia taxed, among other occupations, the business of emigrant agents. An emigrant agent was one who hired laborers to be employed beyond the limits of the State. It was argued that the tax was unconstitutional because the business was interstate commerce. The court, however, held that the agent was not engaged in such commerce. "Of course, transportation must eventually take place as the result of such contracts, but it does not follow that the emigrant agent was engaged in transportation or that the tax on his occupation was levied on transportation."

It was evidently considered that the real performance of the contract was the labor for which the men were employed, the transportation being merely incidental thereto and not a true part of such performance. The transportation, however, did actually take place as a part of the performance of the contract, and it may be questioned whether, to avoid narrow distinctions, the decision might not well have gone the other way.[2]

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[1] (1900), 179 U. S. 270.

[2] The following example, it is believed, illustrates the distinction drawn by *Williams* v. *Fears*. If A, a resident of State X, purchases from B, a resident of State Y, a machine to be used in A's business, the contract calling for delivery to A in State X, the transaction is unquestionably one of interstate commerce. But if, instead of a sale, the contract is a lease to A of the use of the machine for a certain period, delivery, as before, to be made to A in State X, it would appear from *Williams* v. *Fears* that the contract would not

Contracts not within the commerce clause: When, however, transportation does not follow as the result of the performance of the contract, the contract itself is not subject to the regulation of Congress. In the case of *Paul* v. *Virginia*,[1] it was held that the business of insurance was not interstate commerce. "Issuing a policy of insurance," said the court, "is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporation and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having existence and value independent of the parties to them. They are not commodities to be shipped from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different States. The policies do not take effect — are not executed contracts — until delivered by the agent in Virginia. They are, then, local transactions and are governed by the local law."

This case has been severely criticised, but it is submitted that it was correctly decided, and is not inconsistent with the view that commerce is intercourse among the States. A contract of insurance is an agreement to pay a certain sum, dependent upon the happening of

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be a transaction of interstate commerce. The real performance would be the employment of the machine in A's business during the period of the lease, and the interstate transportation would be merely incidental thereto.

[1] (1868), 8 Wall. 168.

a certain contingency. The payment is to be made at a certain place and the performance of the contract does not necessarily involve any transportation between the States. The preliminary negotiations, if between persons in different States, may well be intercourse among the States, but this does not bring the contract, as a contract, within the scope of the commerce clause, and the question involved in *Paul* v. *Virginia* was the right of the State to charge for the privilege of carrying on the business of making such contracts within the State. Thus, the sending of a telegram with reference to the formation of the contract, or the sending of the policy from one State to the other, would be a part of interstate commerce, and the passage of either between the States would be protected against State interference, but this passage would be no part of the performance of the contract. The contract is not completed until the policy is delivered by the agent, and, as the court points out, it is, in itself, no more a transaction of interstate commerce "than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce." In this latter illustration the journey from New York to Virginia would be within the scope of the commerce clause, but the contract itself would be a purely local matter.[1]

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[1] *Paul* v. *Virginia* has been cited in support of the proposition that the sending of a policy of insurance from one State to another is not a transaction of interstate commerce. (Dissenting opinion in *Lottery Case* (1903), 188 U. S. 321, 367.) It is submitted that such was not the decision. It is true that in the opinion it is said that a policy of insurance is not a subject of trade and barter offered in the market, but the court was not dealing with State interference with the transportation of the policy between the States. The character of the business of insurance was under

It is, however, conceivable that the risk of shipping articles of a certain character might be so great that it would never be done without insuring them. In such cases, while the insurance in itself would not be interstate commerce, it might well be so necessary an incident to interstate shipments as to be brought within the jurisdiction of Congress.

In *Nathan* v. *Louisiana*[1] the business of a dealer in foreign bills of exchange was held not to be interstate commerce. The broker was engaged in negotiating purchases and sales of foreign paper, and transportation between the States did not necessarily result in the performance of the contracts made in the course of his business. At the present time, bills of exchange are so essential to all commerce, so important an incident thereto, that it may be seriously contended that State taxation of the business of dealing in them would amount to an actual burden on interstate commerce and therefore would be unconstitutional.

The business of a live-stock exchange is not interstate commerce. Such was the decision in *Hopkins* v. *United States*,[2] a case arising under the Sherman Anti-Trust Act. The exchange employed agents in different States, whose duty it was to persuade owners of live stock to consign it to the exchange for sale. The brokers acted as commission agents in aiding the owner to sell the stock thus consigned. Their acts were regarded as purely local, the court saying: "The selling of an article at its destination, which has been sent from another State,

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consideration, and the sending of the policy was a part of the preliminary negotiations and not of the performance of the contract of insurance. Thus the court, continuing, declares that the contract was not complete until the delivery of the policy by the agent, and was therefore a local matter.

[1] (1850), 8 How. 73.

[2] (1898), 171 U. S. 578.

while it may be regarded as an interstate sale, and one which the importer was entitled to make, yet the services of the individual employed at the place where the article is sold are not so connected with the subject sold as to make them a portion of interstate commerce." Here the services of the brokers on the exchange had nothing to do with the interstate transportation. They merely sold an article which was already at the place of sale.[1]

The recent case of *Ware* v. *Mobile County*[2] furnishes an excellent illustration of the same principles which govern the insurance decisions. The State of Alabama imposed a license tax on the business of buying and selling futures in cotton. Ware and Leland were engaged in this business, with offices in several States, one of these being located in Alabama. Each office was connected with the other by telegraph. Business was transacted somewhat as follows. An order for cotton received in

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[1] In *Hatch* v. *Reardon* (1907), 204 U. S. 152, a sale of live stock in New York by a citizen of Connecticut to a citizen of the same State who was doing business in New York was held not to be a transaction of interstate commerce. "The communication between the parties was not between different States, . . . and the bargain did not contemplate or induce the transport of property from one State to another."

The case of *Swift* v. *United States* (1905), 196 U. S. 375, is somewhat extreme in holding that purchases at a live-stock exchange, to which cattle had been sent from other States, were engaged in interstate commerce. The court seemed influenced by the fact that defendants were constant purchasers. "When cattle are sent for sale from a place in one State," it was said, "with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce."

[2] (1908), 209 U. S. 405.

New York was telegraphed to the office in Alabama, where the cotton was purchased and held for a rise or fall in price, or until a sale was ordered. The cotton was never sent to the State in which it was ordered, but was always held where purchased.

It was argued that these transactions were interstate commerce, and that therefore the company was not liable for payment of the license tax. The court, however, held that the business was purely local. In this case, as in many of the insurance cases, the negotiations preliminary to the making of contracts in the business — the sending of messages by telegraph — were a part of interstate commerce, and a State tax upon the sending of such messages would have been clearly unconstitutional; but this was not sufficient to bring the contracts themselves, which in their performance did not involve interstate transportation, within the jurisdiction of Congress.

Manufacturing is not interstate commerce.[1] As a business in itself, it does not result in interstate transportation, and the fact that sales of the manufactured article may be transactions of interstate commerce, does not make the manufacturing a part of such commerce. "Commerce succeeds to manufacture, and is not a part of it."[2] For similar reasons, production is not commerce among the States.[3]

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[1] *Kidd* v. *Pearson* (1888), 128 U. S. 1; *United States* v. *E. C. Knight Co.* (1895), 156 U. S. 1.

[2] *United States* v. *E. C. Knight Co.* (1895), 156 U. S. 1, 12. A contract by a corporation of one State with a corporation of another State to supervise the erection of a glue factory in the latter State and manage the factory for a certain period, is not a transaction of interstate commerce. *Diamond Glue Co.* v. *United States Glue Co.* (1903), 187 U. S. 611.

[3] *McCready* v. *Virginia* (1876), 94 U. S. 391. When a mining corporation maintains in a foreign State an office where its transfer

When character of interstate commerce attaches: Congress, then, has no jurisdiction over production or manufacture. Nor has it jurisdiction over transportation or commerce which is confined to the limits of a single State. But it is obvious that the power of the Federal Government must extend to more than the mere crossing of the line between the States. "Commerce among the States," said Chief Justice Marshall, "cannot stop at the external boundary line of each State, but may be introduced into the interior."[1] It is necessary, therefore, to determine when the characterof interstate commerce attaches to an article and when it is lost.

For an article to become the subject of interstate commerce, its transit from one State to another must have actually begun. The intention to export is not sufficient to remove the article from State control. Thus, in *Coe* v. *Errol*,[2] logs had been hauled from a point in New Hampshire to the town of Errol in the same State, to be sent by water to a point in Maine. While at Errol the logs were taxed by the State of New Hampshire. It was contended they were subjects of interstate commerce and therefore exempt from the tax. The court held the tax valid, on the ground that the logs had not yet started on their interstate journey, and the intention on the part of the owner to export them was not sufficient to deprive the State of its power to tax them.

But when the transit has actually commenced, the property is the subject of interstate commerce, and

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books are kept, its dividends declared and paid, and other business done by it such as is usually performed by corporations where their principal office of business is situated, it is not engaged in interstate commerce as to such branch office. *Horn Silver Mining Co.* v. *New York* (1892), 143 U. S. 305.

[1] *Gibbons* v. *Ogden* (1892), 9 Wheat. 1, 194.

[2] (1886), 116 U. S. 517.

accordingly exempt from State taxation.[1] It appears that the place of destination as evidenced by the bill of lading, when the goods are transported by carriers, determines the character of the shipment, interstate or domestic. In *Gulf, etc., Railroad* v. *Texas*,[2] a carload of grain was shipped from a point in South Dakota to a point in Texas. The grain was sold while in transit, and upon arrival at its place of destination it was stored for five days, and then shipped to another point in Texas. The second shipment was held to be local and not interstate commerce, so that as to it the carrier was subject to the regulation of the State railroad commission. This rule is obviously sound and practical. When goods are shipped from a point in one State to another point in the same State, it should always be regarded as an intrastate shipment, whether the goods have originally come from another State, or are subsequently shipped out of the State after the arrival at the destination designated in the bill of lading. To hold otherwise would make the character of the shipment within the State depend upon the intention of the shipper.

A shipment between two points in the same State which in the course of its journey passes through part of another State is an interstate shipment, the charges for which cannot be regulated by the State.[3]

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[1] *Rhodes* v. *Iowa* (1898), 170 U. S. 412; *Kelley* v. *Rhoads* (1903), 188 U. S. 1.

[2] (1907), 204 U. S. 403.

[3] *Hanley* v. *Railway Co.* (1903), 187 U. S. 617.

But where a steamship runs between two points in the same State along a boundary river, the fact that on its course it passes over land owned by another State is not sufficient to make it an instrument of interstate commerce. *Cincinnati Packet Co.* v. *Bay* (1906), 200 U. S. 179.

The language of the court in the case of *Lehigh Valley R.R. Co.* v. *Pennsylvania* (1892), 145 U. S. 192, appears to be unsound. In

When the character of interstate commerce is lost; original package doctrine; If an interstate shipment in transit through a State is detained within the State for natural reasons, or for want of transportation facilities, it seems that the character of interstate commerce is not lost.[1] But if detained for an indefinite period, awaiting a sale [2] or awaiting orders for further transportation,[3] the property may be taxed by the State.

The character of interstate commerce is not definitely lost until the transit is ended and the article becomes mingled with the mass of property in the State. The transit is not ended until delivery to the consignee.[4] But delivery to the consignee does not terminate the power of Congress. The article must become mingled with the mass of property in the State. It is difficult to determine the exact time when this occurs. As a rule of convenience the original package doctrine was adopted, according to which an article brought into the State retains its character of interstate commerce until the original package is broken, or, since a sale is the usual object of an interstate shipment, until a sale in the original package.[5]

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it a State tax on shipments between points in the State, which passed through another State in the course of their journey, was held valid as a tax upon domestic commerce. The court expressly declared that the mere passage over the soil of another State did not render the shipments interstate commerce. This case, however, is distinguished in *Hanley* v. *Railway Co.*, on the ground that the tax was proportioned to the mileage within the State.

[1] See *Kelley* v. *Rhoads* (1903), 188 U. S. 1.

[2] *Pittsburg Coal Co.* v. *Bates* (1895), 156 U. S. 577.

[3] *American Steel, etc., Co.* v. *Speed* (1904), 192 U. S. 500.

[4] Thus, moving goods, which had been shipped from another State, from the station platform to the freight warehouse prior to delivery to the consignee, is a part of the interstate transit. *Rhodes* v. *Iowa* (1898), 170 U. S. 412.

[5] *Brown* v. *Maryland* (1827), 12 Wheat. 419; *Leisy* v. *Harden* (1890), 135 U. S. 100.

What constitutes an original package is not entirely settled. Each case must depend largely upon its own facts. In general it may be said that an original package is the package in which the goods are shipped from one State to another.[1] The question of good faith is of material importance. The size of the package, it appears, is important only if it is apparent that an attempt is being made to evade the laws of the State. In *Austin* v. *Tennessee*[2] cigarettes had been sent into Tennessee in loose packages three inches long and one and one-half inches wide. The importer of the cigarettes was indicted under the law of Tennessee, which made it a misdemeanor to sell cigarettes, and he contended that the sale was of goods in the original package. But it was held that the small boxes were not original packages. The test was said to be the size "in which *bona fide* transactions are carried on between the manufacturer and the wholesale dealer residing in different States." The better view would seem to be that it is immaterial whether the article is intended for wholesale or retail trade.[3]

Under this doctrine, the State cannot, of course, prohibit a sale in the original package.[4] But the character of interstate commerce does not continue beyond

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[1] In *Schollenberger* v. *Pennsylvania* (1898), 171 U. S. 1, a ten-pound tub was held to be an original package. In *May* v. *New Orleans* (1900), 178 U. S. 496, merchandise was imported in large boxes, each box containing a number of smaller parcels. The boxes were opened and the merchandise sold in the smaller parcels. It was held that the large boxes were the original packages. In *Leisy* v. *Harden* (1890), 135 U. S. 100, one-quarter barrels, one-eighth barrels, and sealed cases were held to be original packages.

[2] (1900), 179 U. S. 343.

[3] *Schollenberger* v. *Pennsylvania* (1898), 171 U. S. 1.

[4] *Leisy* v. *Harden* (1890), 135 U. S. 100; *Schollenberger* v. *Pennsylvania* (1898), 171 U. S. 1.

the first sale, even though the original package is not broken.[1] If the package is broken before the first sale, the power of Congress comes to an end.[2]

Instrumentalities of interstate commerce: It is well settled that the power of Congress extends also to the instrumentalities employed in interstate commerce, such as railroads, telegraph companies, steamboats, bridges, and the like. A warehouse situated entirely within the limits of a State may become an instrument of interstate commerce.[3] Similarly, a carrier whose lines lie wholly within one State may, by receiving and delivering goods which have been sent from another State under a through bill of lading, subject itself to the power of Congress.[4]

A car regularly used in interstate commerce was held to be an instrument of such commerce while being turned on a switch to await the coming of the train to which it was to be attached.[5] Freight cars with freight from another State, while standing on the tracks of the company awaiting delivery to the consignee, still remain instruments of interstate commerce, and the method of delivery cannot be prescribed by the State.[6] And

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[1] *Waring* v. *Mayor* (1868), 8 Wall. 110.

[2] *May* v. *New Orleans* (1900), 178 U. S. 496.

The original package doctrine does not apply to State taxation of property, and therefore articles imported from another State may be taxed while still in the original package. *Woodruff* v. *Parham* (1868), 8 Wall. 123; *Brown* v. *Houston* (1885), 114 U. S. 622. The only requirement in such case is that the tax shall not discriminate against foreign products. *Welton* v. *Missouri* (1875), 91 U. S. 275.

[3] *Munn* v. *Illinois* (1876), 94 U. S. 113.

[4] *Cincinnati, etc., Ry. Co.* v. *Interstate Commerce Commission* (1896) 162 U. S. 184.

[5] *Johnson* v. *Southern Pacific Ry. Co.* (1904), 196 U. S. 1.

[6] *Mc Neil* v. *Southern Ry. Co.* (1906), 202 U. S. 543.

when a railroad is part of a through interstate line, an office established by it in another State in connection with such business is within the jurisdiction of Congress, and the privilege of maintaining such office cannot be taxed by the State in which it is located, even though no part of the actual road of the company lies within the State.[1]

Navigation: Navigation has always been regarded as a part of interstate commerce.[2] The power of Congress is not confined to bodies of water which touch two or more States, but comprehends the control of all navigable waters which are accessible from a State other than those in which they lie, even though the waters in question lie entirely within the limits of a single State.[3] The common law test of navigability does not apply to rivers in this country. Any river is navigable which is navigable in fact, regardless of whether the tide ebbs and flows. "And they are navigable in fact when they are used, or susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."[4] In the *Daniel*

[1] *Norfolk, etc., Railway* v. *Pennsylvania* (1890), 136 U. S. 114. So the business of an agent who induces persons to travel over an interstate railroad is a part of interstate commerce, *McCall* v. *California* (1890), 136 U. S. 104; as is the maintaining of a station to receive and land passengers from other States. *Gloucester Ferry Co.* v. *Pennsylvania* (1885), 114 U. S. 196. But a cab service maintained within a State by an interstate railroad is not a part of interstate commerce where the cab service is independently contracted for. *Pennsylvania Railroad Co.* v. *Knight* (1904), 192 U. S. 21.

[2] *Gibbons* v. *Ogden* (1824), 9 Wheat. 1.

[3] *Gilman* v. *Philadelphia* (1865), 3 Wall. 713; *Daniel Ball* (1870), 10 Wall. 557; *Miller* v. *Mayor* (1883), 109 U. S. 385; *Williamette Bridge Co.* v. *Hatch* (1888), 125 U. S. 1.

[4] *Supra.*

Ball, a steamship plying on an inland river between points in the same State was held to be engaged in interstate commerce in so far as she was employed in carrying goods sent from points without the State to points within, and from points within the State destined for points in other States. A boat engaged within the limits of a State in towing vessels which are employed in interstate transportation, and in lightering goods to and from such vessels, is itself engaged in interstate commerce.[1]

Ferries: Originally, the right to establish and regulate a ferry was regarded as exclusively within the power of a State, even though the ferry was over a river bounding two States.[2] But at the present time it seems beyond question that such a ferry would be an instrument of interstate commerce, subject to the regulating power of Congress only. The case of *St. Clair County* v. *Transfer Company*[3] held that the business of transporting railroad cars over a boundary river was interstate commerce. The court distinguished the business from that of a ferry, and did not decide that a ferry would be an instrument of interstate commerce, but a decision otherwise would be wholly inconsistent with established principles.[4]

Bridges: The regulation of bridges over navigable streams is within the commerce power of Congress.[5]

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[1] *Foster* v. *Davenport* (1859), 22 Howard 244; *Harman* v. *Chicago* (1893), 147 U. S. 396.

[2] *Conway* v. *Taylor's Ex'r* (1861), 1 Black 603.

[3] (1904) 192 U. S. 454.

[4] See also *Gloucester Ferry Co.* v. *Pennsylvania* (1885), **114 U. S.** 196.

[5] *Pennsylvania* v. *Wheeling Bridge Co.* (1855), 18 How. 421; *Gilman* v. *Philadelphia* (1865), 3 Wall 713; *Union Bridge Co.* v. *United States* (1907), 204 U. S. 364.

In the exercise of this power Congress can free navigation from unreasonable obstructions by compelling the removal of a bridge, and no compensation need be paid to the owners.[1]

Conclusion: An act requiring corporations engaging in interstate commerce to become chartered by the Federal Government should, of course, be drawn on practical lines. If we are correct in drawing from the cases the conclusion that interstate commerce comprises all intercourse which crosses State lines, — whether the transportation be of persons, property or intelligence, — then it would seem advisable and necessary that care should be taken in drawing a federal incorporation act to include within its scope only those companies whose regular business involved in the performance of its contracts transactions of interstate commerce. The sending of a letter or telegram between two or more States in reference to business contracts, where the performance of those contracts does not itself involve transactions of interstate commerce, should not, it is believed, be sufficient to bring the company within the federal act. This matter is not, however, within the scope of the present treatise.

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[1] *Union Bridge Co.* v. *United States* (1907), 204 U. S. 364.

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